INDEX.

TESTIMONY.

For Complainants.

For Defendants.

EXHIBITS.

BILL OF COMPLAINT.

Filed September 6, 1921.

In Chancery of New Jersey

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

The complainants, EDWARD M. SHAUINGER and LILLIAN F. SHAUINGER, of the Borough of Brooklyn, County of Kings and State of New York, respectfully show that:

1. On the 18th day of May, 1920, PHILIP APTER, of the City of Newark, County of Essex and State of New Jersey, being indebted to the said Edward M. Shauinger and Lillian F. Shauinger in the sum of two thousand dollars, executed to them a bond of that date to secure that sum, payable on the 18th day of May, nineteen hundred and twenty-three, with interest at the rate of six per cent. per annum, payable semi-annually from the date of the bond.

2. To secure the payment of the bond the said Philip Apter and Olga Apter, his wife, executed to the said Edward M. Shauinger and Lillian F. Shauinger a mortgage of even date with the said bond, and thereby conveyed to them in fee the land hereinafter described, on the express condition that such conveyance should be void if payment should be made in accordance with the terms of the bond, which mortgage having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in the office of the Clerk of Monmouth County in Liber 577 of Mortgages, pages 310, etc.

3. The mortgaged premises are decribed as follows:

ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Bradley Beach, in the County of Monmouth and State of New Jersey:

BEGINNING at a point in the easterly line of Madison avenue distant one hundred (100) feet southerly from the southeast corner of Fifth avenue and Madison avenue; thence (1) southerly along the easterly sideline of Madison avenue, fifty (50) feet; thence (2) in an easterly direction and at right angles to Madison avenue one hundred (100) feet; thence (3) northerly and parallel with Madison avenue, fifty (50) feet; thence (4) in a westerly direction and again at right angles to Madison avenue, one hundred (100) feet to the point or place of beginning.

4. Both bond and mortgage contained an agreement that if any installment of interest should remain unpaid for a period of thirty days after the same should fall due, then the whole principal sum, with all unpaid interest, should, at the option of the mortgagees, their representatives or assigns, become immediately due.

5. The said mortgage and bond also contained an agreement that upon each interest day there should be paid on the principal sum of the said bond and mortgage the sum of two hundred and fifty dollars, and that in default of the payment thereof the full amount of said bond and mortgage, or the balance due thereon, should become immediately due and payable.

6. The said mortgage contained an agreement that the mortgagor, his heirs and assigns, would pay the taxes, assessments, water rents or other municipal or governmental rate, charge, imposition, or lien, imposed or acquired upon the premises heretofore described; and that if the same should remain unpaid for a period of thirty days, the full amount of the principal of said mortgage should become immediately due and payable.

7. That the said Philip Apter died since the making of said bond and mortgage leaving a last will and testament, duly probated in the office of the Surrogate of Essex County; that by virtue of said last will and testament he devised to his wife, Olga Apter, an estate for life

in the premises herein described encumbered by complainants' said mortgage, and the remainder in fee to his three children: Elizabeth Goldstein, Barney Apter and Eli M. Apter, and nominated and appointed, by virtue of his last will and testament, his wife, the said Olga Apter, and son, Barney Apter, as executrix and executor thereof; but any claim or interest in the said lands and premises that the said Olga Apter, individually or as executrix, Barney Apter, individually or as executor, Elizabeth Goldstein and Eli M. Apter may have therein is subject to the complainants' mortgage.

8. The said Philip Apter in his lifetime and since his death the said Olga Apter have failed to pay the installment of two hundred and fifty dollars on the principal of said mortgage in accordance with the terms and provisions thereof, and which became due and payable November 18, 1920, and has remained unpaid for more than thirty days thereafter; that complainants have elected that the whole of said principal sum, with all unpaid principal and interest, shall now be due; that the defendants have failed to pay the taxes of the Borough of Bradley Beach, the municipality in which said premises are situated, for the year 1920, and that one-half of the sum became due and payable June 1, 1920, and the balance on December 1, 1920; that the same remained due and unpaid for a period of more than thirty days thereafter, and that by reason thereof the complainants elect that the whole principal sum, with all unpaid interest, of their mortgage shall become due; that the said Philip Apter in his lifetime and Olga Apter since his death have always been in possession of the mortgaged premises.

9. The said Barney Apter is married and his wife's first name is unknown; that the said Elizabeth Goldstein is married and her husband's first name is unknown; that the said Eli Apter is married and his wife's first name is unknown, due inquiry being made therefor by

the solicitors for the complainants. That any claim or interest the husband or wives of the parties above-mentioned may have by way of dower, curtesy or otherwise is subject to complainants' mortgage.

10. That the whole amount of principal, with interest thereon from November 18, 1920, is due upon complainants' bond and mortgage; complainants are without adequate remedy in the courts of law and therefore pray:

(1) That Olga Apter, Barney Apter, Mrs. Apter, his wife, Elizabeth Goldstein, Mr. Goldstein, her husband, Eli M. Apter, Mrs. Apter, his wife, and Olga Apter and Barney Apter as executrix and executor of the last will and testament of Philip Apter, deceased, who are the defendants in this suit, may answer this bill of complaint and each statement therein made.

(2) That an account may be taken of the amount due on complainants' mortgage.

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

(4) That a decree may be made for the sale of the mortgaged premises to raise and pay the complainants the amount so found due on their mortgage, with interest and costs.

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

RUNYON & AUTENRIETH,
Solicitors for and of Counsel with Complainants.

Bill of Complaint.

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

JOSEPH F. AUTENRIETH, being duly sworn according to law, on his oath deposes and says:

That on July 5th, 1921, he communicated with J. Leo Rothschild, solicitor for the defendants, Barney Apter and Olga Apter, in the foregoing cause to ascertain the name of the husband and wives respectively of Elizabeth Goldstein, Barney Apter and Eli M. Apter; that the said J. Leo Rothschild advised deponent that he had no knowledge as to whether the said Elizabeth Goldstein or Eli M. Apter were married, and gave no answer at all as to whether Barney Apter was married.

JOS. F. AUTENRIETH.

Subscribed and sworn to at Jersey City
this 19th day of August, 1921,
before me.

J. WILLIAM GRIMMINGER,
Attorney at Law of New Jersey.

ANSWER AND COUNTER-CLAIM.

Filed September 17, 1921.

The answer of the defendants, OLGA APTER and BARNEY APTER, individually and respectively as executrix and executor of the last will and testament of Philip Apter, deceased, and the counter-claim of said OLGA APTER and BARNEY APTER as executrix and executor respectively of the last will and testament of said Philip Apter, deceased:

The said defendants, OLGA APTER and BARNEY APTER, individually and as executrix and executor, answering the second amended bill of complaint herein, say that:

1. They admit that deceased Philip Apter and defendant Olga Apter executed a bond and mortgage to complainants for $2,000, but as to the terms thereof and as to all the other statements contained in paragraphs 1 and 2, deny that they have any knowledge or information sufficient to form a belief.

2. They have no knowledge or information sufficient to form a belief as to the statements in paragraphs 3, 4, 5 and 6.

3. Paragraph 7 is admitted except that these defendants have no knowledge or information sufficient to form a belief as to whether any claim or interest of them or either of them individually or as executrix or executor respectively is subject to the complainants' mortgage.

4. Paragraph 8 is denied except that defendants admit that they have not paid $250.00 on the principal of the mortgage, and admit that the taxes due December 1, 1920, have not been paid by the defendants. They assert with reference to the statements as to the payments by the deceased, Philip Apter, upon information and belief that the taxes due June 1, 1920, were paid by said Philip Apter. As to the terms of the mortgage the defendants have no knowledge or information sufficient to form a belief.

5. Paragraph 9 is denied except that it is admitted that BARNEY APTER, ELIZABETH GOLDSTEIN and ELI APTER are married.

6. Paragraph 10 is denied.

Further answering, defendants, OLGA APTER and BARNEY APTER, individually and as executrix and executor, respectively say that:

7. The said Philip Apter for several months prior to his decease was in ill health and unable to give due attention to his personal affairs.

8. Defendants were unaware that the taxes upon property described in the complaint, which said taxes amounting to only $28.00 were due in December, 1920, had not been paid.

9. Upon information and belief, no tax bill for said taxes was ever received by the said Philip Apter or by these defendants. The tax bills for 1920 were in the possession of the complainants and forwarded to them by the Receiver of Taxes, Borough of Bradley Beach, with the request that they be forwarded to said Philip Apter, or that his address be supplied. Complainants did not forward the same nor did they supply said Philip Apter's address, though same was known to them. Complainants withheld from said Philip Apter knowledge that the said taxes had not been paid. Complainants paid said taxes on or about March 14, 1923. Philip Apter had died previously and these defendants did not qualify as executrix and executor until April 20, 1921. The first information that the taxes had not been paid was contained in the bill of complaint filed herein.

10. Immediately, defendants made inquiry at the office of the Receiver of Taxes, Borough of Bradley Beach, Monmouth County, and were informed that the taxes due December 1, 1920, and June 1, 1920, respectively, had been paid.

11. Upon information and belief, defendants allege that the taxes due June, 1920, were paid and adjusted at

the closing of title on or about May 24, 1920, and the taxes due December, 1920, by the complainants herein. Complainants never notified the defendants or deceased Philip Apter that said taxes had not been paid, and the failure to pay same was wholly inadvertent and unintentional.

12. If it shall be adjudged that there is anything due complainants, defendants offer to pay the amount of said taxes paid by complainants with interest. The taxes due December 1, 1920, having been paid by complainants, these defendants cannot pay the same to the Receiver of Taxes. Nor can defendants pay same to complainants, because as hereinafter alleged, there is more due the defendants from complainants than the amount of said taxes. Defendants have paid the taxes for and through the year 1921.

By way of counter-claim against complainants, defendants, OLGA APTER and BARNEY APTER, say on information and belief, that:

13. On or about May 18, 1920, complainants, EDWARD M. SHAUINGER and LILLIAN F. SHAUINGER, for value received and by deed under seal conveyed to Philip Apter, now deceased, certain land and premises, being the same premises described in the bill of complaint, in the Borough of Bradley Beach, in the County of Monmouth, State of New Jersey, in fee simple.

14. In part payment for said deed, said Philip Apter executed on or about May 18, 1920, a bond in the sum of $2,000.00, payable May 18, 1923, with interest of 6 per centum per annum.

15. To secure the payment of the said bond, said Philip Apter and Olga Apter, his wife and one of the defendants herein, executed to complainants a mortgage, the same being the mortgage described in the bill of complaint, but as to the terms of which defendants have no knowledge or information sufficient to form a belief.

16. The said deed to said Philip Apter contained a covenant on the part of complainants, whereby they them-

selves, their heirs, executors and administrators and each of them covenanted and agreed to and with the said Philip Apter, his heirs and assigns, that the said premises were free and discharged of any and all incumbrances whatsoever, and the said complainants warranted that they would secure and forever defend the said land and premises unto the said Philip Apter.

17. At the time of the making of and delivery of said deed the premises were not free from all incumbrances, but, on the contrary, were subject to a lease for three months from said complainants, EDWARD M. SHAUINGER and LILLIAN F. SHAUINGER, to a certain tenant then in possession, who refused to surrender possession although requested to do so.

18. Said Philip Apter, by reason of the said breach and by reason of the said incumbrance, was unable to secure possession of the premises conveyed to him, or to take possession of the same and was necessarily deprived of their use and obliged to obtain other premises and pay therefore the sum of $800.00 for a period of three months commencing June 21, 1920, and ending September 22, 1920.

19. Since the happening of all the foregoing, said Philip Apter died leaving a last will and testament duly probated in the office of the Surrogate of Essex County. Under said will defendants OLGA APTER and BARNEY APTER were nominated and appointed respectively as executrix and executor thereof, and the said OLGA APTER was given a life estate in the property described in the bill of complaint and herein, remainder in fee to the defendants ELIZABETH GOLDSTEIN, BARNEY APTER and ELI M. APTER.

These defendants therefore pray:

1. That the bill of complaint herein be dismissed.

2. If the Court shall find that defendants are in default in the payment of taxes upon the property described in the bill of complaint, and that complainants are not

indebted to these defendants in excess of the amounts paid by complainants for taxes and sums due under the mortgage herein, that the default of these defendants be opened and defendants be permitted to pay the amount of said taxes and interest.

3. That said complainants, EDWARD M. SHAUINGER and LILLIAN F. SHAUINGER, may answer this counter-claim and each statement herein made.

4. That the sum of $800.00 be found due these defendants by reason of the facts pleaded in the counter-claim herein.

5. That if the Court shall find that the principal of complainants' mortgage is now due, then the amount so to be found due these defendants be credited on the said mortgage debt; and if the amount so found due these defendants shall exceed the amount now otherwise due these defendants, then that these complainants be decreed to pay these defendants the excess.

6. That defendants have such other and further relief as to the Court may seem just and proper.

JAY LEO ROTHSCHILD,
Solicitor for Defendants,
Olga Apter and Barney Apter.

REPLICATION AND ANSWER TO COUNTER-CLAIM.

Filed October 20, 1921.

The complainants join issue on the answer of the defendants, Olga Apter and Barney Apter, individually, and respectively as executrix and executor of the last will and testament of Philip Apter, deceased.

As to the counter-claim contained in said answer, complainants say:

1. They admit the allegations and facts as set forth and contained in paragraphs 13 and 14.

2. They deny the allegations and facts set forth and contained in paragraphs 16, 17 and 18.

3. They admit the allegations and facts set forth and contained in paragraph 19.

RUNYON & AUTENRIETH,
Solicitors for Complainants.

IN CHANCERY OF NEW JERSEY.

Between	
EDWARD M. SHAUINGER, *et al.*, *Complainants,*	*On Bill, &c.*
and	*Testimony.*
OLGA APTER, *et als.*, *Defendants.*	

Transcript of testimony taken in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on the thirteenth day of September, 1922, and continued at the Chancery Chambers, Paterson, New Jersey, on the twenty-first day of September, 1922, before HON. VIVIAN M. LEWIS, Vice-Chancellor.

Appearances:

Runyon & Autenrieth, Esqs., for the complainants (with Mr. Gannon).

J. Leo. Rothschild, Esq., for defendants.

MRS. LILLIAN SHAUINGER, being duly sworn in her own behalf, testified as follows:

Direct examination by Mr. Gannon.

Q You are one of the complainants in this cause? A Yes, sir.

Q Your husband is still living? A Yes, sir.

Q Are you the holder of this bond and mortgage? A Yes, sir.

Mr. Gannon. I offer in evidence the mortgage in question, which has been recorded.

Marked "Exhibit C. 1."

Q And this is the bond accompanying said mortgage? A Yes, sir.

Mrs. Lillian Shauinger, cross.

Mr. Gannon. I offer it in evidence.

Marked "Exhibit C. 2."

Q Has anything ever been paid on account of the interest or principal of this mortgage? A No, sir.

Q Either to you or to your husband? A No, sir.

Q Now, Mrs. Shauinger, did you ever pay any taxes on this property? A Yes, sir.

Q What taxes did you pay? A The bill was turned over to Mr. Autenrieth.

Q Is that the bill I show you? A Yes, sir.

Q Referring to that bill, can you tell us what taxes you paid on this property? A $29.43, with interest and costs.

Q When did you pay that? A March 18, 1921.

Q What did that represent; what taxes or part of year's taxes did that represent? A I guess it is the second half—1920 tax notice.

Q And what part? A One-half.

Q How much did you pay? A $29.43.

Q With interest and costs? A Yes, sir.

Q That was for six months? A Yes, sir.

Cross examination by Mr. Rothschild.

Q State under what circumstances you made the payment of the taxes. A My attorney advised me to pay.

Q Was there any threatened sale? A Yes, sir; a printed notice was mailed to me that they would sell it.

Q Are you sure a printed notice was sent you, that if the taxes were not paid by a certain date the property would be sold to pay the taxes? A I saw the printed notice; it is a regular printed form of Bradley Beach.

Mr. Gannon. The mortgage contains a default clause; I think this is immaterial.

Mr. Rothschild. I am cross examining her on my counter-claim; I thought it would save time.

The Court. Don't cross examine her on that now.

Mr. Gannon. We rest.

DEFENSE.

FRANK C. BORDEN, JR., sworn in behalf of the defendants, testified as follows:

Direct examination by Mr. Rothschild.

Mr. Gannon. Mr. Borden has been subpoenaed by us. I object to using him as their witness.

Mr. Rothschild. I have subpoenaed him also.

By Mr. Rothschild.

Q You are the mayor of Bradley Beach? A Yes, sir.

Q Do you recall that in the year 1919 that you had certain business dealings with Mr. Garfinkle? A It may have been in the first part of January; I have forgotten the exact date.

Q At that time you also knew Mrs. Shauinger, the complainant in this action? A Yes, sir.

Q Just tell how Mrs. Shauinger came to you at that time and under what circumstances.

Mr. Gannon. If this is an attempt to establish agency by the testimony of the agent, I object to it.

Q (Question withdrawn.) In January, 1920, you had a certain conversation with Mrs. Shauinger? A In correspondence with her.

Q Did you see her at all, personally? A No, sir.

Q What correspondence did you have with her? A I wrote her asking her about her house for rent, and I got a reply; I have the reply here; I produce them; I

have several letters fro mher; I produce them. (Hands them over to Mr. Gannon.)

Q Have you got a check and a voucher there, too? A Yes, sir (handing them over to Mr. Gannon).

Q Do you know Edward M. Shauinger? A Yes, sir.

Q Did you have any conversations with him? A I don't recall any conversation with either Mr. or Mrs. Shauinger—I don't think they were down at the shore; I think the first letter you will find is January 5.

Q I show you that letter dated January 5, 1920, bearing the signature of Lillian F. Shauinger, and ask you whether that is the letter you received from her? A Yes, sir, I know it is, yes, sir.

Mr. Rothschild. I offer it in evidence.

By the Court.

Q Do you know her signature? A Yes, sir.

Q How do you know it? A I have been doing business with her for years, and I have seen her write.

The Court. Mark it for identification. That is the best you can do now.

Mr. Rothschild. I would like to offer it in evidence.

The Court. Just offer it for identification now. Are those her letters, Mr. Gannon?

Mr. Gannon. Yes, sir.

The Court. Then you may offer them in evidence.

Mr. Rothschild. Then I offer this letter in evidence.

Marked "Exhibit D. 1."

Further direct.

Q Did you make any reply to the letter dated January 5, 1920, that has been offered in evidence? A Yes, sir, I must have replied to it.

Q How did you make that reply? A It must have been by letter.

Q Have you any copy of that letter? A No, sir; Mrs. Shauinger probably has my letter.

Q Do you recall the date of the next letter? A Several of her letters were not dated. There was a letter shortly after that in which she says—

Q I show you another letter, undated, signed "Mrs. Lillian F. Shauinger," and ask you whether you received that letter subsequent to the one of January 5, which is in evidence? A Yes, sir, I did.

Mr. Gannon. I wish to object to the admission of this letter "January 5, 1919" in ink is written over "January 5, 1920" in pencil—

The Court. Mark it for identification. Mark it "D. 1 for identification" instead of "Exhibit D. 1."

(Note that "Exhibit D. 1" was changed to "Exhibit D. 1 for identification.")

Mr. Rothschild. I offer letter, undated letter, signed "Mrs. L. F. Shauinger," for identification.

Marked "Exhibit D. 2 for identification."

Q I show you letter dated January 24, 1920, addressed to you and signed "L. F. Shauinger," and ask you whether you received that letter from Mrs. Shauinger? A Yes, sir, I did.

Mr. Rothschild. I offer the letter in evidence.

Mr. Gannon. We will admit that.

Marked "Exhibit D. 3."

Q I show you letter dated January 27, addressed to you and signed "Mrs. L. F. Shauinger," and ask you whether you received that letter? A Yes, sir, I did.

Mr. Rothschild. I offer that letter in evidence.

Frank C. Borden, Jr., direct.

Mr. Gannon. That is admitted.

Marked "Exhibit D. 3."

Q I show you undated letter addressed to you and signed "Mrs. Shauinger," and ask you if you received that letter? A Yes, sir, I did.

Mr. Rothschild. I offer it for identification.

Marked "Exhibit D. 4 for identification."

Q I show you undated letter addressed to you and signed "Mrs. Shauinger," and ask you whether you received that letter? A Yes, sir, I did.

Mr. Rothschild. I offer that for identification.

Marked "Exhibit D. 5 for identification."

Q I show you undated letter signed "Mrs. Shauinger," and ask you if you received that letter? A Yes, sir, I did.

Mr. Rothschild. I offer that letter for identification.

Marked "Exhibit D. 6 for identification."

By Mr. Gannon.

Q What is that you are referring to? A It is a typewritten copy of these letters.

Q You made that yourself? A Yes, sir.

Further direct.

Q I show you three other undated letters and ask you whether you received these three letters from Mrs. Shauinger? A Yes, sir, I did.

Mr. Rothschild. May I have these marked for identification merely?

Marked "Exhibit D. 7 for identification, D. 8 for identification, D. 9 for identification."

Q I show you letter dated March 13, 1920, addressed to you and signed by Mrs. Shauinger, and ask you if you received that letter? A Yes, sir, I did.

Frank C. Borden, Jr., direct.

Mr. Gannon. That is admitted.

Mr. Rothschild. I offer it in evidence.

Marked "Exhibit D. 10."

Q Do you know the property at 406 Madison avenue, Borough of Bradley Beach, New Jersey? A Yes, sir.

Q Did you have any dealings with respect to this property for the 1920 season? A Yes, sir.

Q With whom did you have those dealings? A With Mrs. Shauinger.

Q And with whom else? A Mr. Garfinkle.

Q Do you know who owned the property at 406 Madison avenue? A I cannot say that I knew—just whose name it was in I never did know, but I always believed it to be in the name of Mrs. Shauinger.

Q Prior to January or February, 1920, were you employed by either Mr. or Mrs. Shauinger, or both of them, to rent the premises at 406 Madison avenue, Borough of Bradley Beach, New Jersey?

Mr. Gannon. Objected to on the ground that it calls for a conclusion, and that the letters speak for themselves.

Q Did Mrs. Shauinger write to you? A Yes, sir.

Q Following the receipt of the letter dated January 5, and the other letters which are in evidence, did you have any conversation with Mr. Garfinkle about the rental of the premises at 406 Madison avenue? A I attempted to rent it to him.

Q State what the conversations were between yourself and Mr. Garfinkle. A Mr. Garfinkle called on me relative to renting a house for the season, and he finally decided that the Madison avenue house would meet his purposes, and leases were drawn and deposit paid—the leases, together with check for deposit were forwarded to Mrs. Shauinger.

Q What did you do with the deposits? A Forwarded it to Mrs. Shauinger.

Q How? A By check.

Q I show you voucher dated January 20, 1920, No. 3347, on the First National Bank, signed "F. C. Boden, Jr." and bearing indorsement "Mrs. L. F. Shauinger, Lillian F. Shauinger," and ask you whether that is the check that you mailed to Mrs. Shauinger, that you afterwards received from your bank? A That is the check but that check includes a deposit on another house as well.

Mr. Rothschild. I offer the check in evidence.

Marked "Exhibit D. 11½."

Q Do you know whether subsequently Mr. Garfinkle entered into possession of the premises at 406 Madison avenue? A He did.

Q And do you know on what date he went into possession? A I cannot tell you the exact date, but it was about Decoration Day.

Q How long did he remain there? A Until sometime in September.

Q Now, between Decoration Day and September, at any time between those dates, had the deposit which you have just testified you offered to Mrs. Shauinger, been returned by her to you? A I received from Mrs. Shauinger a check—fifty dollars odd—

Q What date? A About April 2nd, 3rd or 4th—the first part of April I know it was.

Q I show you this check, dated April 3, 1920, signed "Mrs. Shauinger," and ask you whether that is the check you received from her on or about that date? A Yes, sir, that is the check.

Q Did you deposit that check? A No, sir.

Mr. Rothschild. I offer it in evidence.

Marked "Exhibit D. 12."

Q Mr. Borden, can you tell us what that sum of $56.25 was for? A I don't know.

Frank C. Borden, Jr., cross.

Q Was it the amount of the deposit which you had obtained on the No. 406 Madison avenue property?

Mr. Gannon. Objected to as leading.

The Court. Objection sustained—it is leading.

Q Did you have any conversation with either Mr. or Mrs. Shauinger subsequent to Decoration Day of 1920? A I don't recall any.

Q In other words, you have had no conversation with either Mr. or Mrs. Shauinger at any time?

Mr. Gannon. Objected to as leading.

Q Is there any conversation that I have not brought out, or that you have not stated, that you have had with Mr. or Mrs. Shauinger? A I do not recall any.

Cross examination by Mr. Gannon.

Q You say you submitted a lease to Mrs. Shauinger? A Yes, sir.

Q Did she ever return that lease to you? A I think she must have, because she returned the check, and she returned the check because at the time she returned the check she wrote a letter, and one of the letters said, "I have sold my property"; that was the last letter I got from her, I think.

Q The time she sent back the check and the leases to you was when she wrote to you that she had sold her property? A Well, I really don't say that; she sent that check along about the first of April. Now, the chances are she would send the leases at the same time. I do not recall the exact conditions.

Q Your recollection is very dim, except for the letters? A Yes, sir.

Q You are basing your testimony really on your recollection as set out through the letters? A Yes, sir.

Q Do you recall whether or not the leases were returned to you? A No, sir; I do not; and I took that up

with my stenographer in my own office yesterday, whether I had received those leases back or not.

Q Who drew the leases? A They may have been drawn by myself or by the girl in my office.

Q I show you a copy of an indenture purporting to be a lease between Mrs. Shauinger, of the Borough of Bradley Beach, and Mr. Samuel M. Garfinkle, and ask you if that is a copy of the lease which you drew up? A That is a copy of the lease which was drawn up in my office, and possibly she did not return it to me.

Q That was drawn up in your office? A Yes, sir.

Q And if you received the leases back they were on this form? A Yes, sir—I don't know whether I got it or not.

Q Do you recall whether or not the leases were signed by Mrs. Shauinger? A I think she wrote me that she would not sign the leases.

Q You cannot tell us whether or not the leases, if they were returned to you, were signed? A If that was one of those leases, it was not returned to me; I only had one set of leases.

Q I ask you if the leases were returned to you were they signed or unsigned? A I don't think they were returned. I should like to answer, but I cannot.

Q You say this lease was drawn by you? A It was drawn in my office.

Q Why did you make it in the name of Mrs. Shauinger as the lessor? A I had been doing my business with her.

Q Why didn't you make it in your own name, as agent for Mrs. Shauinger? A We never do that.

Q Don't you ever make leases as agent? A No, sir.

Q In other words, you merely act as the real estate broker? A Yes, sir.

Q You procure a party ready and willing to lease the property? A Yes, sir.

Q And after you have done that, you consider your functions are finished? A Yes, sir.

Q And you have acted only according to your authority? A Yes, sir.

The Court. That calls for a conclusion, doesn't it?

Q And all you did in this case was simply to procure a party ready and willing to lease? A Yes, sir.

Q And you did not undertake to do anything further than that? A I rented it to him.

Q Now you say, Mr. Borden, that you never had any conversations with Mrs. Shauinger; you say you don't recall any, I mean? A That is what I said.

Q Do you remember Mrs. Shauinger ever calling on you in February, 1920? A I don't remember it; she may have called on me.

Q Don't you remember when she and her son came in your office in February, 1920? A I do not recall it; she may have been there.

Q So that outside of these letters which you produce, your sole authority for the transaction and the terms—is rather, you have no authority in this transaction, or instructions, as to terms? A They are in her letters; she sets forth in one of her letters what she wants to do.

Q Was any time of renting ever mentioned to you, Mr. Borden—that is, the period—the duration of the period for which the lease was to run? A When she listed her houses she set forth no length of time as to how long those houses were to be rented for; after the house was rented she questioned the term and said, if it was going to be rented for that length of time she ought to have more money; that is in her letters.

Q You say that the house was rented—you mean that you had procured Mr. Garfinkle ready and willing to rent it? A Yes, sir; and forwarded her a check to that effect.

Mr. Rothschild. I want to recall him later on the question of damage.

Q You deducted your commission from the deposit for the rental of this property? A Yes, sir.

Q Did you collect the rent later on? A No, sir; they were not paid to me.

Q To whom were they paid? A I don't know that they were paid at all.

Q Didn't you attempt to collect the rents? A I presume I did at the time.

Q You have received commission for renting? A Yes, sir; but not for collecting.

SAMUEL M. GARFINKLE, sworn in behalf of the defendants, testified as follows:

Direct examination by Mr. Rothschild.

Q You are here under subpoena? A Yes, sir.

Q Do you recall January, 1920, in connection with your dealings with the property 406 Madison avenue, Bradley Beach? A Yes, sir.

Q In that period did you have certain conversation with Mr. Borden, who has just testified? A Yes, sir.

Q Tell us just what you said to him and what he said to you about the property at 406 Madison avenue.

Mr. Gannon. I only consent to this testimony on the ground that the agency is established, subject to a motion to strike it out.

The Court. Yes.

Q (Question read.) A When I went down to Bradley Beach he showed me different properties, and I agreed on 406 Madison avenue and agreed upon the rental price; I gave him a check of deposit of $100.00, and the property was to be cleaned up and fixed up suitable for occupation for the season of 1920, and we then drew up leases, of which I have a copy.

Q Did you give that lease to Mr. Borden? A No, sir; I have it.

Q How did it come back to you? A I received it at that time; it is a receipt and lease combined.

Q Let me see it, please. A (Witness hands it to Mr. Rothschild.)

Q I show you this paper, dated January 24, 1920, on the letterhead of Frank C. Borden, Jr., and signed "F. C. Borden, Jr.," which you have just produced; and I ask you whether that is the paper which you received from Mr. Borden at the time you paid him the deposit? A Yes, sir; all but the lower quotation, the scrap which was written on later; March 1st I was over at Bradley Beach again, and Mr. Borden mentioned to me that Mrs. Shauinger thought it was too long a time from May to September, and I told him at that time I did not intend to go in there after Labor Day; he wanted to know if it would be all right for him to make a notation that the rental would be from June 1st, and I said that would be satisfactory to me; and he made a notation on the receipt at that time.

Mr. Rothschild. I offer this in evidence.

Mr. Gannon. I do not consent to it; I object to it.

Marked "Exhibit D. 13½ for identification."

Q Now, Mr. Garfinkle, you went into possession of the premises at 406 Madison avenue, Bradley Beach, didn't you? A Yes, sir.

Q Can you tell me on what date? A On June 5, 1920.

Q How long did you remain there? A Until some time in September.

Q In that period did you have certain conversations with Mrs. Apter or Mr. Apter? A Yes, sir.

Q State what those conversations were.

Mr. Gannon. Objected to.

The Court. Objection overruled.

A After we were in possession of the premises a few weeks Mrs. Apter and Mr. Apter came to take possession

of the premises. They told us they were the owners, and I told them it made no difference to me who were the owners, that I had the lease of the property and that I intended to keep possession of the premises until my lease expired.

Q Did you subsequently have any conversation with either Mr. or Mrs. Shauinger? A Some time prior to the time that I had taken possession—I do not remember whether it was May or April—Mrs. Shauinger came to see me at Elizabeth at my place of business and told me that she had sold the property, and that I could not take possession of the property, and that she would return my check, and I told her I had rented the property in January when rentals were easier to be had, and I did not see my way clear in giving up possession of the property when I had leased it, and go and pay more money for rentals, and I told her I should hold her to the lease.

Q Have you stated all the conversation with reference to what she said about the sale of the property? A She mentioned that the property had been sold, and that I would not be entitled to possession of the property.

Q Did you have any other conversation with either Mrs. or Mr. Shauinger? A None whatsoever.

Cross examination by Mr. Gannon.

Q You say Mrs. Shauinger offered you some money? A She told me she would return me my deposit of a hundred dollars.

Q She told you that? A Yes, sir.

Q And when was it she came to see you in Elizabeth? A Either April or May.

Q When did Mrs. Apter call on you in June? A It must have been after I was in possession about two weeks.

Q You went into possession? A On June 5.

Q That would make it June 19? A No, sir; I went into possession prior to June 5; when I heard there was

some controversy about the possession of the property, I sent a young man down to take possession, and he took possession of the property, and the family came down on June 5.

Q So that when was it Mrs. Apter called? A Two weeks after I took the possession.

Q That would be about the 19th of June? A Around that time; yes, sir.

Q To whom did you pay your rent, Mr. Garfinkle? A On January 24 1 gave Mr. Borden a check of $100, which I have returned here from the bank.

Q You paid $100.00 to Mr. Borden on January 24, 1920? A Yes, sir; on June second, I sent him a check of $175.00, with a letter—

Q Sent who a check? A Mr. Borden; the check must have been for more money, because it is a check for $175.00 and $10.00 for the deposit of gas.

Q What date? A On June second; Mr. Borden then returned to me that check by mail on June fourth, with Mrs. Shauinger's address; I mailed that check to Mrs. Shauinger, 4422 Snyder avenue, Flatbush, Brooklyn; that check never came back from the bank, and I never received any acknowledgment or return; it was never paid by the bank; I never received any acknowledgment or return.

Q Now, there was still a balance of $175.00 due? A In taking possession on June fifth, I served Mr. Borden with a notice in reference to the condition of the property, and notified him that unless the property was fixed up, that we would fix up the property so that it would be suitable for accommodation; we stopped then at the hotel in Bradley Beach until the same was fixed up.

Q When did you serve that notice? A On June fifth; I have a copy of it here.

Q And how long did you stop at the Bradley Beach Hotel? A One week—at the Hotel Lorraine.

Q So that you really never paid any rent to anyone except $100.00 deposit? A That is all.

Samuel M. Garfinkle, cross.

Q What was the idea of that notice you served on Mr. Borden? A It will talk for itself; here it is; that is a copy that I served on Mr. Borden.

Q Did you ever get a signed lease back? A No, sir.

Q So that the only writing you have to show the terms of the leasing, if such a leasing existed, is this paper? A That is all.

Q Where is there anything in that paper to show that the furniture was to be repaired and rooms were to be cleaned and the other terms mentioned, in that notice? A When I rented the property there was a certain clause—

Mr. Rothschild. Objected to.

Q Without referring to the paper, you never received any signed lease? A Not other than that paper.

Q And the only terms of letting that are in writing are contained in this paper, "D. 13½ for identification"?

The Court. Don't refer to that; it is not in evidence.

Mr. Rothschild. I have no objection to your putting it in evidence.

Q What was your basis of calling on Mr. Borden to take care of the matters set out in this notice?

Mr. Rothschild. Objected to as calling for a conclusion—

Q Did you have any writing or any agreement with Mr. Borden—did you have any written agreement with Mr. Borden that the matters contained in your notice should be taken care of before you went into possession?

Mr. Rothschild. Objected to.

The Court. Objection sustained.

Mr. Gannon. I will offer in evidence the paper marked "Exhibit D. 13½ for identification."

Marked "Exhibit D. 13½."

Samuel M. Garfinkle, cross.

Q Outside of the terms contained in this writing you had no written agreement with Mr. Borden requiring the items contained in your notice of June 5, to be taken care of?

Mr. Rothschild. Objected to, because the notice is not in evidence.

Q To whom did you send this notice? A Delivered it in person to Mr. Borden.

Q And he has the original?

Mr. Gannon. (Speaking to Mr. Borden.) Have you the original of this notice, Mr. Borden?

Mr. Borden. I don't know.

Q Is this a true copy of the notice you served on Mr. Borden? A Yes, sir.

Mr. Gannon. I offer that in evidence.

Marked "Exhibit D. 14."

Q Now, outside of this paper writing dated January 4, 1920, on the letterhead of Frank C. Borden, setting out your agreement of renting of these premises, you had no agreement in writing providing that the matters mentioned in this notice should be taken care of? A I wanted the property as it was—to be fixed up in a good condition; and when I came to take possession there was broken furniture, broken rockers and different things in the entire place; so that is why I sent that notice telling him he must replace those chairs and fix up the place to be habitable; and we had the place straightened out.

Q With whom did you have that agreement regarding the fixing up of the premises? A It is customary in renting property at the shore, that the place is delivered to you clean.

Q (Question read.) A With Mr. Borden.

Q And it is not mentioned in that writing, is it? A No, sir.

Olga Apter, direct.

Q Why didn't you put it in the writing? A In leasing any property at the shore—

Q Never mind that. A I expected it would be clean.

Q What was your idea in serving that notice, Mr. Garfinkle?

Mr. Rothschild. Objected to.

The Court. Objection sustained.

Mr. Gannon. Most certainly, if the defendants in this case had collected the rent from this man we would be entitled to credit for it; in other words, they are now claiming $800.00 damage; I think it is material in this case in mitigation of their claim. The defendants claim $800.00 damages by reason of the breach of this covenant for peaceable possession. Our claim is, that if they had collected the rent from this man we would be entitled to a reduction of that claim of $800.00 to that extent; they having collected it we are entitled to the rent.

BARNEY N. APTER, sworn in behalf of the defendants, testified as follows:

Direct examination by Mr. Rothschild.

Mr. Rothschild. This is one of the executors of the mortgagor. I will withdraw this witness for the present. I want to call the mother, as she tells me she knows more about it.

OLGA APTER, sworn in behalf of the defendants, testified as follows:

Direct examination by Mr. Rothschild.

Q Mrs. Apter, you are the widow of Philip Apter, deceased? A Yes, sir.

Q You are the executrix? A Yes, sir.

Q You are sued in a representative capacity? A Yes, sir.

Q I show you a contract of sale, dated April 22, 1920, between Edward M. Shauinger and Lillian F. Shauinger, and Philip Apter, and ask you whether you were present at the time of the signing of that agreement? A Yes, sir.

Q And you know the signatures—is that your husband's signature? A Yes, sir.

Q Did you see Mrs. Shauinger sign? A No, sir.

Mr. Rothschild. I offer the contract of sale in evidence.

Mr. Gannon. All right.

Marked "Exhibit D. 15."

Q Did you have any conversations at any time with Mr. or Mrs. Shauinger? A No, sir.

Q You never had any personal dealings of any kind with them? A No, sir.

Q Did you try to get possession of the premises at 406 Madison avenue? A Yes, sir; I did.

Q Did you get possession? A No, sir; I did not; it was after Mrs. McNeely called me up. She is the agent through whom I bought the house; she was the agent for Mrs. Shauinger; she called me up on the telephone.

Q Had you ever talked to her before that time? A No, sir.

Q Did you ever see her afterwards? A Yes, sir; I came to the office after I was called up.

Q You met Mrs. McNeely afterwards? A Yes, sir.

Q Did you have conversations with her afterwards? A Yes, sir.

Q Did that conversation refer back to the telephone conversation? A Yes, sir.

Q Is that the way you know it was she? A Yes, sir; and she said she was surprised to find we were not there; that was around June fifteenth; so the next day my hus-

band and I went out to Bradley Beach, and we went in to Mrs. McNeely, and she and Miss Ferry told us that there was somebody else there and we could not get in; so we went over to Mr. Garfinkle's—my husband, myself and my two boys—this son and my younger son, Barney; and we spoke to Mrs. Garfinkle.

Q Tell me whether or not you were able to get possession of the property? A No, sir; because the house was leased—

Mr. Gannon. I object to that.

A Then I went into Mrs. McNeely's office again to look for another place; I had said we had to have a place immediately; and when we got there we looked for a different place; but we could not get it through Mc-Neely; somebody in the office took us around to show us different places, but we could not come to an agreement and we went to Mr. Borden, and then we went to 607 Fourth avenue, Bradley Beach, and we had to pay $800 for that cottage from beginning June 16 to September 15, but we took possession June 22.

Q I show you the lease, dated June 16, 1920, between George W. Rogers and Philip Apter, and ask you whether that is the lease you signed for the premises at 607 Fourth avenue? A Yes, sir.

Mr. Rothschild. I offer the lease in evidence.

Mr. Gannon. I object to that; I don't think it is properly executed. It is between George W. Rogers, and it is signed "George W. Rogers, by F. C. Borden, Agent"; there is no witness and no signature of Philip Apter to it.

Mr. Rothschild. The lease is offered only in corroboration of the witness' testimony.

The Court. Mark it for identification; objection is sustained; it is not proven yet.

Marked "Exhibit D. 15 for identification."

Olga Apter, direct.

By the Court.

Q You went into this property; did you go there and pay rent to Mr. Rogers? A Yes, sir, $800.00.

Q How much a month? A I paid $200.00 when we rented it, and then I paid $600.00 in three installments.

Q You did not get possession of the property that you had purchased? A No, sir.

Q Did you pay anything on the face of the mortgage? A I paid $1,500.00.

Q Do you know that mortgage? A Yes, sir.

Q You and your husband executed that? A Yes, sir.

Q Did you pay anything on that mortgage of $2,000? A No, sir, I don't think so.

Q So, as an actual fact, when you bought this property you could not get possession because there was a tenant in there? A Yes, sir.

Q And you did not know there was a tenant in when you bought it? A I did not.

Q And, therefore, you had to rent another property? A Yes, sir.

Q And you paid $800.00 in rent to the other party? A Yes, sir.

The Court. If you are going to prove a counterclaim you cannot prove it by a mere statement of this party, who evidently did not give some of the checks herself, probably.

The Witness. They were given by my husband.

The Court. She is sued in a representative capacity.

Mr. Rothschild. I shall have to supply the proof, then.

Further direct.

Q I show you certified check, dated November 15, 1921, for $107.50, and ask you whether—to the order of

Edward M. and Lillian F. Shauinger—and ask you what you did with that check? A We sent it to Mr. and Mrs. Shauinger.

Q How is it you now have the check in your possession? A Why, it is cancelled.

By the Court.

Q Is that your check? A Yes, sir.

Q Your own? A Yes, sir.

Q Is that your writing? A Yes, sir, the signature is mine.

The Court. How did they get the check, Mr. Rothschild?

Mr. Rothschild. It has not been cashed at all.

Q Was this sent before you rented the other property? A No, sir, after.

Q How long after? A When the interest came due.

Mr. Gannon. That check was sent as a tender, after suit was started, and it was refused by us on the ground that it was not proper tender.

Mr. Rothschild. I offer in evidence this check dated November 15, 1921.

Marked "Exhibit D. 17."

Mr. Rothschild. I also offer in evidence letter dated November 18, 1921, signed "Runyon & Autenrieth," and addressed to myself, dated November 18, 1921.

Marked "Exhibit D. 18."

Mr. Rothschild. I also offer in evidence letter dated November 16, 1921, addressed to Edward M. Shauinger and Lillian F. Shauinger, and signed "Barney N. Apter and Olga Apter."

Marked "Exhibit D. 19."

Olga Apter, cross.

Mr. Rothschild. There has never been any question of willingness or ability to pay.

Mr. Gannon. I object to the introduction of these papers last introduced in evidence except for the purpose of proving a tender.

Further direct.

Q When did Mr. Apter die? A February 27, 1921.

Q Was that before or after the mortgage payments became due? A That was after the mortgage payments became due.

Q Did you as executrix receive any tax notice with respect to 406 Madison avenue? A Absolutely none.

Q Did you receive any communication of any kind from Mrs. Shauinger that taxes had not been paid? A No, sir, I got no communication from her.

Mr. Gannon. I am willing to waive the question of the default in payment of taxes, to save time.

Cross examination by Mr. Gannon.

Q Mrs. Apter, you never had any conversation with either Mr. or Mrs. Shauinger? A No, sir.

Q When did Mrs. McNeely telephone you? A It must have been about the 15th of June, 1920.

Q And you made a contract for the sale of this property on April 22? A Yes, sir.

Q And you received title on May 18, 1920? A Yes, sir.

Q But it was not until June 15 that you attempted to go into possession? A That is right.

Q Now, Mrs. McNeely sold this property to you? A Her clerk sold it to me; Mrs. McNeely was not there at the time, but Miss Ferry and Mrs. McNeely's sister were there when I bought the property; the sister took me over to look at the property and I bought it.

Q So when you say that the first conversation you had with Mrs. McNeely was over the telephone on June 15, 1920, you do not mean that that was the first conversation you had with Mrs. McNeely's office in connection with this sale, do you? A No, sir; she notified me that my property was occupied.

Q I am not asking you that—I am asking you when you say that your first telephone conversation with Mrs. McNeely was on June 15, 1920, that does not mean that your first negotiations with Mrs. Neeley's office were on that date? A That is the first time I saw Mrs. McNeely.

Q But prior to that you were dealing with Miss Ferry? A Yes, sir.

Q And the negotiations for the purchase of this property were conducted with Miss Ferry and Mrs. McNeely's sister? A Yes, sir.

Mr. Gannon. I will reserve my right to cross examine Apter in case the vouchers are not produced. Mr. Rothschild is to produce them at a later date, I understand.

FRANK C. BORDEN, JR., recalled.

Re-direct examination by Mr. Rothschild.

Q I show you "Exhibit D. 16," and I ask you whether the signature of George W. Rogers, owner, by F. C. Borden, Jr., was made by you? A Yes, sir; that is "F. C. Borden, Jr., Agent."

Mr. Rothschild. Now, I offer this exhibit in evidence.

Marked "Exhibit D. 15."

Re-cross examination by Mr. Gannon.

Q So that it was your practice to sign leases as agent? A Not necessarily.

Frank C. Borden, Jr., re-direct.

Q You signed this lease as agent for Mr. Rogers? A Possibly.

Q And in the event of your signing a lease as agent for the owner you merely acted as real estate broker? A I act as agent in all cases where I have property to rent—I act as agent, meaning that I have authority to do business with the property in question for the owner.

Q You have authority to do business? A Yes, sir; I sign as his agent and I must have had a conversation with him about it.

Q Unless you call up the owner and obtain his authority you don't do it? A I cannot do it without their authority.

By the Court.

Q You don't mean to say you don't sign leases? A No, sir; I do sign them when I have authority from the owner.

Q You have a regular form for it, haven't you? A Yes, sir.

Q You have them printed by the thousand? A Yes, sir.

Further re-cross.

Q Why didn't you sign the lease for Mrs. Shauinger as agent, instead of sending the lease to her to sign? A Unless the owners tell me to fix it up for them, I don't do it.

Re-direct examination by Mr. Rothschild.

Q At the time you signed "Exhibit D. 15," who was present; was Mrs. Apter present? A I don't know who paid me the deposit; whoever paid me the deposit was there—

Q Was Mrs. Apter present at the time that lease was signed? A I don't know which one rented the property from me.

Q Now, how long have you been in the business of renting and selling and buying real estate in Bradley Beach? A Since 1913.

Q Have you acted as agent and broker for various buyers and sellers or renters during that period? A Yes, sir.

Q And have you become familiar with the value of property from the renting point of view and from the selling point of view? A Yes, sir.

Q Have you kept in touch with the prices which property brings, both for rentals and sales? A Yes, sir.

Q Can you tell me, then, based upon your experience, what the value of the premises at 406 Madison avenue, Borough of Bradley Beach, New Jersey, was for the period commencing June, 1920, and ending with the season of that summer?

Mr. Gannon. I object; it is incompetent to show what the damage was; there was an agreement made, and this woman has gone out apparently and made another lease—

The Court. It might show a motive in the matter.

Q I should say in addition, on April 22, 1920— A May I say this—that the real estate agents do not set the rental values of the properties; the owners set those values.

Q Do you know what the fair valuation of this property was in April, 1920, located as that property was—taking all those things into consideration? A I could not tell you what it was worth; I might say this: That after the first of February there became a scarcity of houses and rents commenced to go up. Now, from a rental standpoint, I would not say it was worth more than $500 rental for the season.

Q In April, 1920? A Yes, sir.

Mr. Gannon. I object to the time—April.

The Court. I will allow it to stand.

Mrs. Lillian Shauinger, direct.

Q In April, 1920, was there property of the kind, character and location of that at 406 Madison avenue available in Bradley Beach?

Mr. Gannon. Same objection.

The Court. Yes.

A I think it would be awfully hard for me to answer; I don't know.

Q How do you fix the value of the rental in April, 1920? A The kind of a house and the scarcity.

MRS. LILLIAN SHAUINGER, recalled for the purpose of proving letters.

Examination by Mr. Rothschild.

Q I show you several letters and ask you whether those letters are in your writing? A Yes, sir.

Mr. Rothschild. I offer all of them in evidence.

Mr. Gannon. Objected to.

The Court. I will receive them.

Marked "Exhibits D. 1, D. 2, D. 3, D. 4, D. 5, D. 6, D. 7, D. 8, D. 9."

Q I show you this check dated April 3, 1920, bearing what appears to be your signature, and ask you whether that is your signature? A Yes, sir.

Mr. Rothschild. I offer the check in evidence.

Mr. Gannon. Objected to unless the application or the purpose of the check is shown; I object to it on the ground that it is immaterial and irrelevant.

Marked "Exhibit D. 12."

Mr. Rothschild. That is our case, except for the proof that your Honor has said I can put in later.

The Court. One week from tomorrow come in and finish up the case.

IN CHANCERY OF NEW JERSEY.

Between	
EDWARD M. SHAUINGER, *et al.*, *Complainants,*	*On Bill, &c.*
and	*Testimony.*
OLGA APTER, *et als.*, *Defendants.*	

Transcript of testimony taken in the above-entitled cause, at the Chancery Chambers, Paterson, New Jersey, on the twenty-first day of September, 1922, before Hon. VIVIAN M. LEWIS, Vice-Chancellor.

Appearances:

Runyon and Autenrieth, Esqs., for the complainants (with Mr. Gannon);

J. Leo Rothschild, Esq., for the defendants.

EMMA F. ROGERS, sworn in behalf of the defendants, testified as follows:

Direct examination by Mr. Rothschild.

Q You are the daughter of George W. Rogers? A Yes, sir.

Q And he owns the premises at 607 Fourth avenue, Bradley Beach? A By brother owned it, but we had the rent from the property.

Q But, in any event, at that time you were familiar with and had knowledge of the transaction in connection with that property? A Yes, sir.

Q Do you recall whether in June, and subsequently in 1920, you received certain payments of rent for 607 Fourth avenue from Mr. Apter?

Frank C. Borden, Jr., direct—cross.

Mr. Autenrieth. I object to that.

The Court. How is it material?

By the Court.

Q How much did they pay all told? A $800.00.

FRANK C. BORDEN, JR., being recalled, testified as follows:

Direct examination by Mr. Rothschild.

Mr. Rothschild. He is going to testify as to the valuation of the Madison avenue property, rental value; he has been qualified; do you want me to go through it again?

Q Mr. Borden, based upon the testimony which you have the last time, will you state what, in your opinion, was the value of the property at 406 Madison avenue for rental for the summer season of 1920, June, 1920? A You mean, if the house had not been rented at that time?

Q Yes. A It would probably bring $800.00.

Cross examination by Mr. Autenrieth.

Q You rented it in January for $450.00? A Yes, sir.

Q What is the rental season down there? A They rent anywhere from the 1st of May to the 1st of October—it is the summer season.

Q What is understood by that? A Those arrangements are always made by the tenant as to the length of time they wish to occupy the property, and the landlord is the one to be consulted whether it is agreeable or not, if there is no stipulation made by the landlord—the arrangement is made subject to the approval of the landlord.

Q It is a fact that the earning season is assumed to be three months? A Yes, sir, I would suppose it was.

Q And you rented this place in January for five months for $450.00? A That was the original rent.

Mrs. Olga Apter, cross.

Q Yet you say if the property were vacant in June you think you could have gotten $800.00? A I think so.

Q That would be for three months? A Not necessarily; it might rent until the first of October.

Q Most people come down after Decoration Day and go home immediately after Labor Day? A About fifty-fifty.

Re-direct examination by Mr. Rothschild.

Q As a matter of fact, is it or not true, that as the season progresses the rentals for properties in summer resorts for the summer increase? A That depends entirely upon the season.

Q In 1920 was that the fact? A 1920 happened to be a very big year, but that is not always so; in 1920 it was so; houses became scarce.

Re-cross examination by Mr. Autenrieth.

Q It depends entirely on the season? A Yes, sir.

The Court. I think his suit is at law if there is any suit at law.

(After argument on that point):

Mr. Autenrieth. There is one fact that they might admit, that the defendant made no effort to collect the rent on the property.

Mr. Rothschild. I won't concede that.

MRS. OLGA APTER, recalled.

Cross examination by Mr. Gannon.

Q You are the executrix of the estate of Mr. Apter? A Yes, sir, my son and myself.

Q When did he die? A February 27, 1921.

Q Did you ever attempt to collect the rents from Mr. Garfinkle while he was in possession? A No, sir.

Q Do you know whether or not Mr. Apter did? A He did not attempt it.

REBUTTAL.

LILLIAN SHAUINGER, recalled.

Direct examination by Mr. Autenrieth.

Q Do you recall writing this letter marked "Exhibit D. 3," dated January 27, 1920, to Mr. Borden? A That is my writing.

Q I call your attention to your statement in this letter, in which you say: "I appreciate your kindness in renting my property early, but I cannot let the Madison avenue house go at $450.00 for five months"? A Yes, sir.

Q "I expect to get that for three months," and then later in the letter you advise him to hold the lease until you hear from him? A Yes, sir.

Q Did you ever hear from Mr. Borden about those leases? A Just in conversation in February on a holiday.

Q What did you say to him about the season? A I told Mr. Borden I would not think of accepting $450.00 for five months; I could not get it ready for the first of May; and he said "All right; this party is going to buy the house;" he said "Everything is all right."

Q Did he say anything to you then about his having made a lease for you? A No, sir.

By the Court.

Q Did you have any conversation with him about that matter of leasing? A Yes, sir; I said I would not rent the house for five months because I could not get it ready by the first of May.

Q How about the price? A The price was not objectionable; I did not mind renting the house for three months, but not for five months; that is our whole trouble.

Lillian Shauinger, direct.

Further direct.

Q In your letter in which you refused to sign the lease—

Mr. Rothschild. Objected to as leading.

Q In your letter of January twenty-seventh you say this: "I cannot let the Madison avenue house go at $450.00 for five months (underscoring the word "five"), you say, "I expect to get that for three months"? A Yes, sir.

Q When you saw Mr. Borden after this letter was written, did you have any conversation with him about the amount of money for the term of five months? A No, sir; no amount of money was mentioned—

Mr. Rothschild. Objected to—the witness has already stated she had no objection to the price, and this question is directed to correcting his own witness on the witness stand.

The Court. Objection overruled.

A (Continued.) —that I recollect—

Q Now, according to these exhibits you wrote Mr. Borden several times? A Twice in February, and then later on in person.

Q Was it before or after you had sold the house to the Apters? A Oh, before.

Q After this occasion was there any talk between you as to your signing these leases that he sent you? A I went up and told him I had not signed any leases.

Q What did he say to that? A I don't just recollect what he did say, I am sure. He seemed perfectly satisfied himself; he was not interested in what I was doing.

The Court. Strike that out.

Q Now, in "Exhibit D. 9" you say, "Enclosed please find check for $51.25"; there is no date on that letter. Do

you know when it was written? A I think on the third of April.

Q And what was that amount of money; why did you send it in two items? A Well, I got the commission mixed up with the deposit; he retained $33.75 commission, and my amount out of the $100.00 was $66.25, which would have been my balance, and then he had rented another cottage.

Q The check that you received from Mr. Borden in the first instance, was that only on this Madison avenue house? A No, sir; two houses, this check for deposit on two houses.

Q And the other house I understand you went ahead on that transaction? A The deposit was sent back, but the people went in that house, and they sent the money through us; that was all right, and I did not have any trouble with it.

Cross examination by Mr. Rothschild.

Q Mrs. Shauinger, when was it you first began negotiations through Mrs. McNeely for the sale of the Madison avenue property? A Very late in April was the first I ever knew anything.

Q You are sure it was not in March? A I am positive about that, because I did not know I was going to sell my house; I was just as willing that Mr. Borden should rent the house for three months; I would not sell the house if there was a lease on it.

Q I suppose you have forgotten that the contract for the sale of this Madison avenue property was dated April twenty-second; now, you surely don't mean you began your negotiations after you signed the contract? A No, sir.

Q Now, you are quite positive you began the negotiations before April twenty-seventh? A Late in April, I say; I knew I could not sell the house with a lease on it, and I gave no lease; I never gave any lease.

Lillian Shauinger, re-direct.

Q But you kept the $100.00 deposit from January until April? A Yes, sir.

Mr. Gannon. That is absolutely wrong; she did not get $100.00; the commission was taken out; $66.25, that is all, mind you, out of the $100.00.

Q When you returned the check for $56.25, on the following day, on April fourth, and check for some $33.00 besides, at that time you had not even given the property to Mrs. McNeely to sell. A All the agents had it listed for sale or rent.

Q At that time had you given the property to Mrs. McNeely to sell? A It was listed on the books of all the agents; it was listed I guess in January.

Q Listen to the question—I want to know whether, at the time, April third or fourth of 1920, when you returned that $56.25 check, and the other check, the next day, to Mr. Borden, whether at that time you had already given the property to Mrs. McNeely to sell? A Yes, sir.

Q And isn't it a fact at that time that Mrs. McNeely had already advised you that the Apters were willing to buy? A No, sir.

Q At that time you had not even heard of the Apters? A No, sir.

Re-direct examination by Mr. Autenrieth.

Q You say all the agents in Bradley Beach had your property to sell and to rent? A Yes, sir.

Q Did you give it to Mrs. McNeely especially? A No, sir; all alike.

SUR-REBUTTAL.

MRS. OLGA APTER, recalled.

Direct examination by Mr. Rothschild.

Q Will you please state at what date you began your negotiations with Mrs. McNeely for the purchase of the property? A I could not state the exact date; it was the latter part of March.

Cross examination by Mr. Autenrieth.

Q You began these negotiations? A Yes, sir; I called up from Mrs. McNeely's office to Newark, New Jersey, and told Mr. Apter about the house, and I asked him if I should give a deposit then, and I did give a deposit on the property at 406 Madison avenue at that time.

Q Did you get a receipt for it? A Yes, sir; we have the receipt.

Q Have you got a receipt for that deposit? A No, sir.

Q Your husband did not sign a contract until almost a month after, did he? A About the middle of April.

Q Then you got your deed for the property a month after that? A I got the deed sometime in April.

Q What is the date of your deed—May eighteen is the date of your deed? A Yes, sir.

Q Do you mean to say it was a matter of nearly two months from the time you first negotiated before you got your deed? A It was not quite two months, but it was either the latter part of March or the beginning of April.

Q It might have been the beginning of April? A It was around that time; I cannot just exactly recollect.

Q Was it about April fifteenth when you first saw Mrs. McNeely about the property? A No, sir.

REST ALL.

Mr. Autenrieth. They have proven their case on the theory of damage. I think the point of law involved is this; we gave a deed on May eighteenth. At that time the property was vacant.

The Court. In view of the fact that this has strung along, suppose you write a memorandum and come in next week, and I will hear you. I should like a written memorandum of it. I don't want the testimony written up. When you get the facts down, with some assurance that they are absolutely correct, the factual matters, I can consider it better on some other occasion. I will do it next week. I will set it down for October fourth.

Exhibit C. 1.

EXHIBIT C. 1.

Mortgage

PHILIP APTER, *et. ux.*
to
EDWARD M. SHAUINGER & LILLIAN F. *ux.*

THIS INDENTURE, made the eighteenth day of May in the year of our Lord One Thousand Nine Hundred and Twenty,

BETWEEN PHILIP APTER AND OLGA APTER his wife of the City of Newark in the County of Essex and State of New Jersey party of the First Part;

AND EDWARD M. SHAUINGER AND LILLIAN F. SHAUINGER his wife of the Borough of Brooklyn in the County of Kings and State of New York party of the Second Part;

WHEREAS, the said PHILIP APTER is justly indebted to the said party of the Second Part in the sum of Two THOUSAND ($2000) Dollars lawful money of the United States of America secured to be paid by a certain bond or obligation bearing even date with these presents in the penal sum of FOUR THOUSAND ($4000) Dollars lawful money as aforesaid conditioned for the payment of the said first mentioned sum of Two THOUSAND ($2000) Dollars lawful money as aforesaid to the said party of the Second Part their executors administrators or assigns on the eighteenth day of May which will be in the year One Thousand Nine Hundred and twenty-three and interest thereon to be computed from the day of the date hereof at and after the rate of six per cent per annum and to be paid semi-annually—said principal sum of Two Thousand Dollars to be reduced by payments of at least $250.00 semi-annually.

Exhibit C. 1.

And it is Thereby Expressly Agreed that should any default be made in the payment of the said interest or of any part thereof, on any day whereon the same is made payable as above expressed or should any tax assessments water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage and become due and payable and should the said interest remain unpaid and in arrears for the space of thirty days or said tax assessment water rent or other municipal or governmental rate, charge, imposition or lien or any or either of them remain unpaid and in arrears for the space of thirty days then and from thenceforth that is to say after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Two Thousand ($2000) Dollars with all arrearage of interest thereon shall at the option of the said party of the second part or their legal representatives become and be due and payable immediately thereafter although the period above limited for the payment thereof may not then have expired anything therein before contained to the contrary thereof in anywise notwithstanding: as by the said bond or obligation and the condition thereof, reference being thereunto had, may more fully appear.

Now This Indenture Witnesseth, That the said party of the First Part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation with interest thereon according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to him in hand paid by the said party of the Second Part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged has granted, bargained, sold, aliened, released, conveyed and confirmed and by these presents does grant, bargain, sell, alien, release, convey and confirm, unto the said party of the Second Part and to their heirs and assigns forever,

Exhibit C. 1.

ALL that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Borough of Bradley Beach in the County of Monmouth and State of New Jersey.

BEGINNING at a point in the easterly line of Madison avenue distant one hundred (100) feet southerly from the southeast corner of Fifth Avenue and Madison Avenue; thence (1) southerly along the easterly side line of Madison Avenue fifty (50) feet; thence (2) in an easterly direction and at right angles to Madison Avenue one hundred (100) feet; thence (3) northerly and parallel with Madison Avenue fifty (50) feet; thence (4) in a westerly direction and again at right angles to Madison Avenue one hundred (100) feet to the point or place of beginning.

BEING the same premises conveyed unto the said Philip Apter by Edward M. Shauinger and LILLIAN F. SHAUINGER his wife by deed bearing even date herewith and to be recorded simultaneously with this mortgage being given as a part of the purchase price thereof, and also being second and subsequent to one on amount of Two Thousand Dollars held by Minette L. Tice, now covering said property.

TOGETHER with all and singular the tenements hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits theroef; AND ALSO all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the said party of the first part of, in and to the same and every part and parcel thereof with the appurtenances:

TO HAVE AND TO HOLD the above granted and described premises with the appurtenances, unto the said party of the Second Part their heirs and assigns to their own proper use, benefit and behoof forever.

PROVIDED ALWAYS and these presents are upon this express condition that if the said party of the First Part

Exhibit C. 1.

his heirs executors or administrators shall well and truly pay unto the said party of the Second Part their executors administrators or assigns the said sum of money mentioned in the condition of said bond or obligation and the interest thereon at the time and times and in the manner mentioned in the said condition according to the true intent and meaning thereof, that then these presents and the estate hereby granted shall cease determine and be void.

And the said Philip Apter for himself his heirs executors and administrators does covenant and agree to pay unto the said party of the Second Part their heirs executors administrators or assigns the said sum of money and interest as mentioned above and expressed in the conditions of the said bond.

And it is Agreed that neither the mortgagor nor the heirs or assigns of the mortgagor shall be entitled to any credit on the interest payable on this mortgage for the taxes which may be levied on the mortgaged premises or for any part of such taxes.

And it is also agreed by and between the parties to these presents that the said party of the First part shall and will keep the building or buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire in some safe and responsible Insurance Company or Companies to an amount not less than Two Thousand and 00/100 Dollars and assign the policy and certificate thereof to the said party of the Second Part as collateral security for the payment of the principal and interest aforesaid; and in default thereof it shall be lawful for the said party of the Second Part to effect such insurance and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises added to the amount of the said bond or obligation and secured by these presents and payable on demand with legal interest.

Exhibit C. 1.

In Witness Whereof the said party of the First Part have hereunto set their hands and seals the day and year first above written.

PHILIP APTER (L. S.)
OLGA APTER (L. S.)

Signed, Sealed and Delivered
in the presence of

Edw V. Patterson, Jr.

State of New Jersey, }
County of Monmouth } *ss.*

Be it Remembered, That on this eighteenth day of May in the year of our Lord One Thousand Nine Hundred and twenty before me the subscriber a Notary Public of New Jersey, personally appeared Philip Apter and Olga Apter his wife who I am satisfied are the mortgagors mentioned in the within Indenture to whom I first made known the contents thereof, and thereupon they acknowledged, that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed;

And the said Olga Apter being by me privately examined separate and apart from her said husband further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband.

(L. S.) EDWARD V. PATTERSON Jr.
Notary Public N. J.

Received and Recorded May 24th A. D. 1920 at 8 A. M.

JOSEPH McDERMOTT,
Clerk.

Exhibit C. 2.

STATE OF NEW JERSEY, } *ss.*
MONMOUTH COUNTY, }

I, JOSEPH MCDERMOTT, Clerk of said County do hereby certify, that the foregoing copy of Mortgage PHILIP APTER AND WIFE TO EDWARD M. SHAUINGER AND WIFE is true and correct as the same remains of record in my office, in Book 577 of Mortgages page 310.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said County, this 1st day of August A. D. 1921.

(SEAL)

JOSEPH McDERMOTT,
Clerk.

EXHIBIT C. 2.

KNOW ALL MEN BY THESE PRESENTS: That *I, Philip Apter of the City of Newark, in the County of Essex and State of New Jersey, am* held and firmly bound unto *Edward M. Shauinger and Lillian F. Shauinger of the Borough of Brookly , in the County of Kings and State of New York* in the penal sum of *Four Thousand ($4000.) Dollars* lawful money of the United States of America, to be paid to the said *Edward M. Shauinger and Lillian F. Shauinger, their* executors, administrators or assigns: FOR WHICH PAYMENT well and truly to be made, *I* bind *myself, my* heirs, executors and administrators, firmly by these presents. Sealed with *my* seal. Dated the *eighteenth* day of *May* One Thousand Nine Hundred and *twenty.*

THE CONDITION of the above obligation is such that if the above bounden *Philip Apget, his* heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the above named *Edward M. Shauinger and Lillian F. Shauinger, their* executors, administrators or

Exhibit C. 2.

assigns, the just and full sum of *Two Thousand ($2000) Dollars* on the *eighteenth* day of *May* which will be in the year One Thousand Nine Hundred and *twenty-three,* and the interest thereon, to be computed from *the day of the* date hereof at and after the rate of *six* per cent. per annum, and to be paid *semi-annually Said principal sum of Two Thousand Dollars to be reduced by payments of at least $250. semi-annually.* without any fraud or other delay, then the above Obligation to be Void, otherwise to remain in full force and virtue.

And It Is Hereby Expressly Agreed, that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said interest remain unpaid and in arrear for the space of *thirty* days, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of *thirty days* then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of *money, or so much thereof as may then remain unpaid,* with all arrearage of interest thereon, shall, at the option of the said *obligee,* or *the* legal representatives *of the said obligee,* become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

And *it is further expressly agreed, that the said obligor shall not be entitled to and will not claim any credit on the interest payable on the mortgage securing this bond*

Exhibit C. 2.

for taxes which may be levied upon the mortgaged premises, or for any part of said taxes.

PHILIP APTER (SEAL)

Signed, sealed and delivered in the presence of:

EDW. V. PATTERSON, JR.

60c revenue stamps

(Memorandum of Payments not filled in.)

BOND

PHILIP APTER

to

EDWARD M. SHAUINGER and
LILLIAN F. SHAUINGER

Amount,.....$2000.
Date May 18th, 1920
Due, May 18th, 1923
Interest Payable semi-annually

Exhibit D. 1.

EXHIBIT D. 1.

Letter

Brooklyn, January 5, 1920.

Mr. Borden.

Dear Sir:

Thank you for your inquiry to my properties. I will certainly appreciate it if you will kindly try hard to rent them for a good figure as I have just purchased a new home in Flatbush and need all the cash I can get. I am listing them at the following quotations, but certainly will appreciate it if you will get as much as possible. Will you kindly try and sell at least one of them for me shortly?

My renting figures are:

$400.00 Net for Madison Ave.
350.00 Net for McCabe
300.00 Net for Park Place

If you can get more by renting for a longer season I will appreciate it as I mentioned I *need the money.*

Wishing you a very happy and prosperous New Year and thanking you in advance.

Very truly yours,
LILLIAN F. SHAUINGER
4422 Snyder Ave.,
Flatbush.

P. S.

There is a mortgage of two thousand on Madison—and fifteen hundred on McCabe

Mrs. S.

Exhibit D. 2.

EXHIBIT D. 2.

Letter

Mr. Borden.

Dear Sir:

I thank you very much for your kind letter. I am very sorry to hear you had trouble with finding the houses open and thank you again for your care in them. It is too bad some agents will be careless. I do wish I could sell Madison and McCabe properties as I cannot give them the attention I feel is necessary. Do what you can to dispose of them for me, please.

If you get that party who is interested in my Park Place Ave. house to go $10.00 *better,* you may close the deal. You know I need the money and think the season looks good as I understand a number of places have already been taken. Do your best for me. I surely will appreciate it. Thanking you again for your kindness. I expect to go to the shore shortly and will see you in person.

Kindest regards to all.

Very truly yours,

L. F. SHAUINGER.

Exhibit D. 3.—D. 3-2nd.

EXHIBIT D. 3.

Letter

Brooklyn, January 24, 1920.

Mr. Borden.

Dear Sir:

Just to cause no later complications, I am writing a few lines, as *I just received an inquiry* to my Madison Ave. house and have made the price $5,000 but if sold now party who is interested to receive this seasons rental. I trust you will also do your best to try and sell for me. Have not received leases as yet.

Very truly yours,

LILLIAN F. SHAUINGER

EXHIBIT D. 3—2nd.

Letter

Brooklyn, January 27, 1920.

Mr. Borden.

Dear Sir:

I surely appreciate your kindness in renting my properties early *but* I cannot let the Madison Ave. house go at *$450* for *five* months. I expect to get that for three months. I need the money but I could not have the house ready for May 1st. I am sorry you did not get me $300 net for my Park Place Ave. house. I am *sure* it is worth it, and I wish you would write to the rentor and state the fact I expect to get that. I trust you will not be offended. I surely want to do what is right, having trouble about renting makes me more anxious to *sell.* I do not like to have you dissatisfied and I do not want to be myself. I

Exhibit D. 4.

am holding the leases to hear further from you. I will sell my Madison Ave. house for *$5000. Net,* the buyer to receive the property in good condition. I have a party from Asbury who is interested but I am delaying. I am asking *$5000 Net,* one thousand cash balance on terms to suit the purchaser.

Kindly do not be angry as I am so far away it is very hard for me to do as I would like. I have your check and will want to hear from you. My phone is *9957 Flatbush.*

Trusting all will be satisfactory to all concerned.

Respectfully yours,

L. F. SHAUINGER.

EXHIBIT D. 4.

Letter

Mr. Borden.

Dear Sir:

Will you kindly let me hear from you as soon as possible in regard to my Madison Ave. house. *I* have a party who is interested to buy and an agent is very anxious to sell to a party who is waiting to rent if you cannot come to some agreement with your party. I am waiting to hear from you so you will not be hurt if I sell. I had a party to look at the house Sunday when I was there, but am waiting to hear from you. I wanted to talk to you but you were so busy I did not want to delay you.

Trusting all will be satisfactory.

Very truly yours,

LILLIAN F. SHAUINGER
4422 Snyder Ave.,
Flatbush.

Exhibit D. 5.

EXHIBIT D. 5.

Letter

Mr. Borden.

Dear Sir:

I have been patiently waiting to hear from you. I must know *at once* whether your client will buy the Madison Ave. house or not. I have lost a good opportunity as I was waiting to hear from you. Of course, you understand I cannot rent the house for more than three months. I have turned down *3* rentals all better than your offer. Now I am leaving your *sole* agent to rent and get *$500* for me, you can get it don't get discouraged. I refused that from *2* agents as I had to wait to hear from you. There was a card rented in the door when I was down by another agent but I took it out. No doubt there is another there now, but I will not accept less than $500. for *3* months and as I closed my list to the other agents you are the *only one* who has my properties. The more rental you get the more commission you get so it works both ways. Perhaps it is not fair for me to let you know what other agents are getting but as long as I do not mention any names that clears me.

I must have $10 for water on the McCabe Ave. house before I sign the leases. I am not satisfied and am undecided about the Park Place house at *$300* you know I said at least *$325*. That was rented at *350* by a lady agent but I cannot do anything until I straighten matters with you. Kindly let me hear from you. This is a good rental season so don't get angry all will be all right. I need money very badly as I told you I am asking you again to do your best for me. Thanking you if you answer soon.

Very truly yours,

L. F. SHAUINGER.

Exhibit D. 7.

EXHIBIT D. 7.

Letter

Mr. Borden.

Dear Sir:

Will you kindly let me know as soon as possible about the Madison Ave. house. I wrote you stating we could not possibly get it in readiness for May 1st and could not rent for five months at price offered. I surely hope you are not angry I tried to get you on the phone two or three times but was unable to do so. Shall I hold your check until you get some one to rent it for three months at that figure? What shall I do? I have had a check mailed to me of a deposit on my Park Place Ave. house for *$50* more than you are getting what will I do? I also had an offer from another agent for the same amount of *$50,* over renting must be extremely good at present. Kindly do your best for me as I told you I need the money and may get desperate, but I want to treat you fair. I wrote one agent a letter which I guess they didn't care to receive because I couldn't help it. *I* want to treat you *all* alike *fair,* and I hope you will do the same for me. I do so want to sell as I seem to get *"in dutch"* every season about something as I am so far away.

Mr. Shauinger says the water bill must have $10 deposit at time of renting and he will not go to any extra expense whatever, the places to be taken as they are *but clean.*

Now Mr. Borden read this letter as though I were talking to you and do not feel hurt. I am treating you fair as I have not favored any agent. Kindly let me hear from you as soon as possible.

Very truly yours,

L. F. SHAUINGER
4422 Snyder Ave.
Flatbush.

Exhibit D. 7—2nd.

P. S.

I expect to be at Bradley soon but please let me hear from you. L. S. I just received an excellent offer of rental for my Madison Ave. house but will wait to hear from you.

Mrs. S.

EXHIBIT D. 7—2nd.

Letter

Mr. Borden. Thursday, A. M.

Dear Sir:

I am still waiting to hear from you about my properties. *I* am receiving inquiries right along and I am obliged to ask you to let me know *at once* how matters stand with you. If I do not hear from you by Saturday I shall return your check, as I want to have matters all settled up as quickly as possible. I have written you a few times but you fail to reply. I do hope you will answer and let me know definitely about all properties concerned. I have lost a buyer and two in fact three agents rented after you and I had to return checks, so you see I am treating you fair and expect to receive the same fairness from you. Awaiting your early reply.

Very truly yours,

L. F. SHAUINGER
4422 Snyder Ave.
Flatbush.

Exhibit D. 8—D. 9.

EXHIBIT D. 8.

Letter

Mr. Borden.

Dear Sir:

Enclosed please find keys to Madison Ave. house also 308 McCabe Ave. I shall be greatly obliged if you could sell at least one of these houses. We had an offer on the Madison Ave. house but we feel we ought to get $4500 Net also $3500 net for McCabe. Will you kindly remember them and try and dispose of them for me. All free and clear. Terms to suit purchaser.

Thanking you in advance.

Very truly yours,

L. F. SHAUINGER
430 Marion St.,
Brooklyn, N. J.

P. S.

Could you get me a loan of $2000 on each of these houses and what would it cost me?

L. S.

EXHIBIT D. 9.

Letter

My dear Mr. Borden:

Enclosed please find check for $56.25. Mr. Shauinger insists I return this to you as he is greatly annoyed in your keeping him guessing about the Madison Ave. house. We as I told you lost two good chances of selling at the figure quoted to you. As the sale did not go through he will not accept *$300* rental on the Park *Plce* Ave. house he would have done that to please you if you had settled the Madison Ave. matter but I cannot get him to sign the leases and he insists he will not rent 309

Exhibit D. 9.

Park Place less than $350 the price quoted you at first. He is *not* going to rent Madison at all but sell. The price now is $5500. I had an agent last week ask me to allow them to sell but I couldn't as I tried to treat you O. K. and perhaps lost another chance. I need *$1000* cash and if I do not hear your client wants to buy I will list the house with others and put a sign on and push the sale. I am so sorry you have neglected to settle this matter as Mr. Shauinger said from the first I was foolish not to take the matter up with some one else but *I* waited to hear from you. Now as the matter stands your deposit is enclosed and my Park Place is "For Rent" at *$350* and Madison Ave. *"For Sale"* at *$5500* with *One Thausand* CASH, terms to suit purchaser. I do not want to list with others but if you feel your client does not wish to purchase at price quoted after my waiting so long to hear from you why then I am the looser perhaps. Let me hear at once from you as while I am waiting I may have another chance to sell. I shall wait until Thursday morning to hear from you.

Very truly yours,

L. F. SHAUINGER

P. S.

Will you try and collect the enclosed water bill for me.

Thanking you

MRS. S

Do your best to *sell* my Madison Ave house as Mr. S. is greatly put out about it.

L. S.

You can put a sign on if you *wish.*

Exhibit D. 10.

EXHIBIT D. 10.

Letter

Brooklyn, Nov. 13, 1920.

Mr. Borden.

Dear Sir:

Will you kindly let me know by return mail what decision you have come to on Madison Ave. house. I have written you several letters but you have not answered me. I am in a quandary as to where I am at. Please write me so we can both know how matters stand. I have not signed any leases as I am waiting to hear from you.

Awaiting an early reply.

Very truly yours,

L. F. SHAUINGER
4422 Snyder Ave.
Flatbush

P. S.

You have spoiled my selling to two different parties so if I can sell (*unless I hear from you*) I am going to do so as I certainly am angry.

MRS. S.

Exhibits D. 11½—D. 12.

EXHIBIT D. 11½.

Check

THE FIRST NATIONAL BANK
Bradley Beach, N. J. Jan. 26th, 1920.

No. *3347*

Pay to the order of Mrs. L. F. Shauinger
Ninety-three and 75/100.....Dollars
$93.75/100

F. C. BORDEN ,Jr.

Frank C. Borden, Jr., Real Estate and Insurance, Main Street, Bradley Beach, N. J.

EXHIBIT D. 12.

Check

Asbury Park, N. J. Apr. 3, 1920. No. 75
ASBURY PARK & OCEAN GROVE BANK
Pay to the
Order of Frank Borden $56.25
Fifty-six ..... Dollars

LILLIAN F. SHAUINGER

Exhibits D. 13½—D. 14.

EXHIBIT D. 13½.

Receipt

Bradley Beach, N. J. Jan. 24, 1920

Received from Samuel M. Garfinkel of No. 119 Broad St. Elizabeth, N. J. ONE HUNDRED ($100.00) DOLLARS as deposit and part payment, to apply on the season rental of house No. 406 Madison Ave. Bradley Beach, at FOUR HUNDRED AND FIFTY ($450.00) DOLLARS, season May 1st., to Oct. 1st. Balance of payments to be made ONE HUNDRED AND SEVENTY-FIVE ($175.00) DOLLARS on May 1st., 1920, and July 1st., 1920 one hundred and seventy-five ($175.00).

MRS. SHAUINGER,
Owner.

By F. C. BORDEN, JR.
March 1st, 1920.

As per Mrs. Shauinger's request, the term of Possession of the premises aforesaid shall be from June 1st and next payment shall be due on date of possession.

MRS. SHAUINGER, *Owner.*
By F. C. BORDEN, JR., *Agt.*

EXHIBIT D. 14.

Notice

June 5, 1920.

To F. C. Borden, Jr., Agent for
Mrs. Shauinger:—

Please take notice that terms of my lease have not been carried out in following particulars:—(a) Furniture removed and replaced with damaged furniture. (b) Rooms in filthy condition (c)—I shall carry into effect terms of lease, at your expense, unless you carry out same in 24 hours.

Exhibit D. 15.

EXHIBIT D. 15.

Agreement

THIS AGREEMENT,

Made the twenty-second day of April in the year of our Lord One Thousand Nine Hundred and twenty

Between

EDWARD M. SHAUINGER and LILLIAN F. SHAUINGER, his wife, of the Borough of Brooklyn in the County of and State of New York party of the First Part; And

PHILIP APTER

of the City of Newark in the County of Essex and State of New Jersey party of the Second Part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of

FIVE THOUSAND FIVE HUNDRED ($5500.00) DOLLARS to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenant and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty free from all encumbrance except as hereinafter mentioned on or before the twentieth day of May next ensuing the date hereof, all that lot, tract, or parcel, of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Bradley Beach in the County of Monmouth and State of New Jersey.

BEGINNING at a point in the easterly line of Madison Avenue, distant one hundred feet southerly from the south east corner of Fifth Avenue and Madison Avenue; thence (1) in a southerly direction fifty (50) feet; thence (2) easterly, at right angles with Madison Avenue, one hundred (100) feet; thence northerly, parallel with Madi-

Exhibit D. 15.

son Avenue, fifty (50) feet. thence westerly again at right angles with Madison Avenue, one hundred feet to the point or place of Beginning.

This conveyance being made subject to the conditions, and restrictions contained in former deeds to said property.

And the said PHILIP APTER 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 said sum of

FIVE THOUSAND FIVE HUNDRED ($5500.00) DOLLARS as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

$300.00 as deposit receipt of which is hereby acknowledged; $1200.00 on or before May 20th, 1920, or upon delivery of deed; the said party of the second part to assume mortgage of $2000 at 6% now covering said premises; the said parties of the first part to take back a second mortgage in amount of $2000 for a term of three years, interest at six per cent, said mortgage to be reduced by payments of at least $500.00 annually.

It is further agreed and understood that all furniture and fixtures now contained in said property are included in this sale.

It is also agreed that taxes and fire insurance and interest are to be apportioned as of date of passing title.

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 day of next ensuing the date hereof, and from thence take the rents, issues and profits to and their use.

Exhibit D. 15—2nd.

And it is further Agreed, by the parties hereto, that the said Deed of Warranty shall be delivered and received at the office of the R. McNeely Agency between the hours of in the noon and o'clock in the noon on the said day of next ensuing the date hereof

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 which they hereby fix and settle as liquidated damages therefor.

In Witness Whereof, the said parties have hereunto interchangeable set their hands and seals the day and year first above mentioned.

Signed, Sealed and Delivered
in the presence of

EDWARD M. SHAUINGER
LILLIAN F. SHAUINGER
PHILIP APTER

EXHIBIT D. 15—2nd.

Lease

THIS INDENTURE, made this sixteenth day of June in the year of our Lord One Thousand Nine Hundred Twenty

Between GEORGE W. ROGERS, of the Borough of Bradley Beach in the County of Monmouth and State of New Jersey, party of the first part;

And PHILIP APTER of the city of Newark in the County of Essex and State of New Jersey, party of the second part;

WITNESSETH, that the said party of the First Part (by Frank C. Borden, Jr., Agent,) do hereby demise and

Exhibit D. 15—2nd.

lease unto the said party of the Second Part all that certain furnished cottage known as No. 607 Fourth Ave., Bradley Beach, N. J., with privilege of garage. Piano to remain in cottage, with the appurtenances and the sole and uninterrupted use and occupation thereof, (except as hereinafter mentioned), for the term commencing the 22nd day of June 1920 and ending the 22nd *da* of September 1920 at 10 o'clock in the forenoon of that day; For the sum of EIGHT HUNDRED ($800.00) DOLLARS, payable as follows:

TWO HUNDRED ($200.00) DOLLARS as deposit and part payment hereby

THREE HUNDRED ($300.000) DOLLARS on June 22, 1920.

THREE HUNDRED ($300.00) DOLLARS on July 15, 1920.

Privilege to remain until October 1st at a proportionate cost of rent.

And the said party of the Second Part does hereby agree to pay the said party of the First Part his heirs, assigns, agents or attorneys the said rent, at the time and in the manner aforesaid and should he neglect or fail to perform any of the covenants and agreements herein specified, then the tenancy shall be at the option of the party of the First Part, and he may enter said premises and eject all persons therefrom.

And the party of the Second Part does further promise and agree that he will not Re-Let or Under-Let the whole or any part of said premises, nor assign this lease nor use or permit any part thereof to be used for any other purpose than private dwelling without the written consent of the said party of the First Part, his heirs, assigns, agents, or attorneys, under the penalty of forfeiture and damages; that the said party of the First Part, his heirs, assigns, agents or attorneys, may enter with agents or employees into and upon said premises at reasonable hours in the day time, to examine the same, to make such repairs and alterations therein as shall be necessary for

Exhibit D. 15—2nd.

the preservation thereof, the party of the First Part not being bounden, however, to make any repairs unless it be elsewhere in this Lease expressly agreed; and to exhibit them at any time during the said term, from ten o'clock in the morning to five o'clock in the afternoon (Sunday excepted), to any person or persons, and put up notices "To Let" or "For Sale" on the outside wall thereof. If the said premises shall become vacant or deserted during the said term, the said party of the Second Part does hereby authorise the said party of the First Part, his heirs, assigns, agents or attorneys, to re-enter the same at his option, and Re-Let them, and receive and apply the rent so received to the payment of the rent due by these presents.

And the said party of the Second Part doth further agree to pay all the Water Rates assessed upon said property during said term as additional rent, payments to be made promptly when said water rents fall due and before any penalties or interest are chargeable thereon, and if the party of the Second Part fails therein, the party of the First Part may pay the same and recover the same on demand or evict the said party of the *Seond* Part as in other cases of non-payment of rent.

And it is also understood and agreed that should there by a renewal of this lease between the parties named, or a re-letting of the said premises between said parties, the same shall be considered as having been affected by and through the agency of Frank C. Borden, Jr., and the regular commission shall be payable to him whether rentals are collected by him or not.

And the said party of the Second Part does further agree to keep the premises in as good repair as the same shall be at the commencement of said term (wear and tear arising from reasonable use of the same and damage by the elements excepted); and will replace and furniture, cooking utensils or crockery damaged by them or their

Exhibit D. 17.

servants with similar quality of merchandise, or pay the worth thereof to the party of the First Part, and at the expiration of said term to yield up the peaceable possession of the said party of the First Part his heirs, assigns, agents or attorneys.

In Witness Whereof, the said parties hereunto, in duplicate, set their hands and seals the day and year first mentioned.

GEORGE W. ROGERS,
Owner.

By F. C. Borden, Jr., *Agt.*

Sealed and delivered
in the presence of

EXHIBIT D. 17.

Check

No. *16979* Newark, N. J. *Nov. 15 1921*

PHILIP APTER & SON

Pay to the order of *Edward M. & Lillian F. Shauinger*

$*107.50* *One Hundred Seven and 50/100*.....Dollars

Estate of Philip Apter
O. Apter
Ext'r

NATIONAL NEWARK AND ESSEX BANKING CO.
NEWARK, N. J.

Certified Nov. 15, 1921.
Nat'l Newark & Essex Banking Co.

Exhibit D. 18.

EXHIBIT D. 18.

Letter

November 18th, 1921.

Jay Leo Rothschild, Esq.,
790 Broad St.,
Newark, New Jersey.

Shauinger vs. Apter

Dear Sir:

Your clients, the executor and executrix, sent a check in the sum of $107.50 to my client on the bond and mortgage. In their letter they have presummed to deduct $800. from the amount of their claim from the mortgage. Of course we understand that it is very strange that this happens without your knowledge, but, nevertheless, we are returning the check to you herewith as our client does not seem to be affected by the play that was made and is determined to fight her suit to a finish. Will you please return it to your clients accordingly?

Very truly yours,

RUNYON & AUTENRIETH,
J. F. Autenrieth.

Enc. 1

Exhibit D. 19.

EXHIBIT D. 19.

Letter

November 14, 1921.

Edward M. Shauinger and
Lillian F. Shauinger,
4422 Snyder Ave.,
Brooklyn, New York.

Dear Sir & Madam:

We find that there will become due on November 18th, 1921 on the bond and mortgage of Philip Apter, deceased, $107.50 after deducting $800.00, the amount of damage sustained by the estate of Philip Apter, due to your failure to give said Philip Apter possession of the premises at Bradley Beach.

As executor and executrix of the estate of the said Philip Apter, we inclose herein our certified check to your order for said $107.50, receipt of which you will please acknowledge.

Very truly yours,

BARNEY APTER
OLGA APTER
Executor and executrix under the last will and testament of the said Philip Apter, deceased.

Stipulation.

STIPULATION.

Filed October 21, 1922.

IN CHANCERY OF NEW JERSEY.

Between EDWARD M. SHAUINGER, *et al.*, *Complainants,* *and* OLGA APTER, BARNEY APTER, *et als.*, *Defendants.*	*On Bill, etc.* *Stipulation.*

It is stipulated that the following facts be incorporated in the record of the hearing of this cause:

1. Prior to the commencement of this suit, defendants herein were plaintiffs in an action in the Municipal Court of the City of New York, wherein the complainants were defendants. The subject matter of the said action was the same as the counter-claim herein, the plaintiffs asking for damages in the sum of $800.00.

3. Deed between complainants and Philip Apter, deceased, recorded in the office of the Clerk of Monmouth County in Book 1113 of Deeds, on page 400, was offered herein at the first session of this hearing and it is consented that it may be marked in evidence *nunc pro tunc.*

AUTENRIETH & GANNON,
Solicitors for Complainants.

JAY LEO ROTHSCHILD,
Solicitor for Defendants,
Olga & Barney Apter.

Exhibit Offered by Stipulation.

EXHIBIT OFFERED BY STIPULATION.

Oct. 21, 1922

EDWARD M. SHAUINGER & LILLIAN F.,
HIS UX
to
PHILIP APTER.

THIS INDENTURE, Made the eighteenth day of May in the year of Our Lord one thousand nine hundred and twenty,

BETWEEN EDWARD M. SHAUINGER AND LILLIAN F. SHAUINGER his wife of the Borough of Brooklyn in the County of Kings and State of New York party of the first Part

AND PHILIP APTER of the City of Newark in the County of Essex and State of New Jersey, party of the Second Part;

WITNESSETH, That the said party of the first part, for and in consideration of ONE DOLLAR AND OTHER VALUABLE CONSIDERATIONS lawful money of the United States of America to them 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, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed and by these presents do 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 that certain tract or parcel of land and premises, hereinafter particularly described situate, lying and being in the Borough of Bradley Beach in the County of Monmouth and State of New Jersey

BEGINNING at a point in the easterly line of Madison Avenue distant one hundred (100) feet southerly from

the southeast corner of Fifth Avenue and Madison Avenue, thence (1) southerly along the easterly side line of Madison Avenue fifty (50) feet thence (2) in an easterly direction and at right angles to Madison Avenue one hundred (100) feet, thence (3) northerly and parallel with Madison Avenue, fifty (50) feet, thence (4) in a westerly direction and again at right angles to Madison AVENUE one hundred (100) feet to the point or place of beginning.

BEING the same premises conveyed unto the said Edward M. Shauinger and Lillian F. Shauinger his wife, by Christian Schmdit and Eleanor Schmidt, his wife, by deed dated June first 1910 and recorded in the Monmouth County Clerk's Office in Book 885 of deeds page 74 etc, this conveyance being made subject to the covenants, and restrictions contained in former deeds to said property, this conveyance also made subject to a certain indenture of mortgage in amount of two thousand dollars, held by Minette L. Tice, now covering said property and the payment of which said mortgage and interest thereon, the said party of the second part hereby assumes and agrees to pay as a part of the purchase price hereof.

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;

AND the said EDWARD M. SHAUINGER & LILLIAN F. SHAUINGER do for themselves, their heirs executors and

Exhibit Offered by Stipulation.

administrators covenant and agree to and with the said party of the second part, his heirs and assigns, that the said EDWARD M. SHAUINGER AND LILLIAN F. SHAUINGER are the true, lawful and right owners of all and singular the above described land and premises and of every part and parcel thereof, with the appurtenances thereunto belonging, and that the said land and premises, or any part thereof, at the time of the sealing and delivery 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 have good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in mannter aforesaid;

AND ALSO that Edward M. Shauinger and Lillian F. Shauinger will Warrant secure and forever defend the said land and premises unto the said Philip Apter 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;

IN WITNESS WHEREOF the said party of the first part have hereunto set their hands and seals the day and year first above written.

EDWARD M. SHAUINGER, (L. S.)
LILLIAN F. SHAUINGER, (L. S.)

Signed, Sealed and Delivered
in the presence of

P. MASTRIDGE.
($1.50 I. R. U. S. Stamp Cancelled)

Exhibit Offered by Stipulation.

STATE OF NEW YORK, }
COUNTY OF KINGS, } *ss.*

BE IT REMEMBERED, That on this 18th day of May in the year of Our Lord one thousand nine hundred and twenty, before me the subscriber, a Commissioner of Deeds, personally appeared EDWARD M. SHAUINGER AND LILLIAN F. SHAUINGER, his wife, who I am satisfied are the grantors mentioned in the within indenture, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed, And the said Lillian F. Shauinger being by me privately examined, separate and apart from her said husband further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, Freely, without any fear, threats or compulsion of her said husband.

PASQUALE MASTRIDGE,
Commissioner of Deeds for the City of New York,
residing in Kings County
Register No. 154 Kings County No. 77
N. Y. Co., Reg. No. 20071 Expires Oct. 15, 1920.

STATE OF NEW YORK, }
COUNTY OF KINGS, } *ss.*

I, WILLIAM E. KELLY, Clerk of the County of Kings, and also CLERK of the Supreme Court for said County, (said Court being a Court of Record) Do HEREBY CERTIFY that Pasquale Mastridge the Commissioner of Deeds before whom the within acknowledgment was made was at the time of taking the same authorized by the laws of the State of New York to take the acknowledgments and proofs of deed or conveyances for land tenements and hereditaments situate, lying and being in said State of New York And further, that I am well acquainted with

OPINION OF VICE-CHANCELLOR.

Filed November 2, 1923.

IN CHANCERY OF NEW JERSEY.

Between	
EDWARD SHAUINGER, *et ux.*, *Complainants,*	*On Bill, &c.*
and	*Opinion.*
OLGA APTER, *et als.*, *Defendants.*	

Messrs. Autenrieth and Gannon for complainants.

Mr. J. Leo Rothschild for defendants.

V.-C. LEWIS:

This bill is filed to foreclose a mortgage on premises situated at No. 406 Madison avenue, Borough of Bradley Beach, State of New Jersey. The mortgage was given by Philip Apter, now deceased, husband of the defendant, to complainant for two thousand dollars ($2,000) with interest at six per cent., payable semi-annually, and providing for the payment of two hundred and fifty dollars ($250) semi-annually on account of the principal. The defaults alleged are:

(1.) Non-payment of interest.

(2.) Non-payment of installments due under the terms of the mortgage.

(3.) Non-payment of taxes and water rents within the time prescribed by the terms of the mortgage.

It was admitted by the defendants that the interest and principal had not been paid and the third ground of foreclosure was abandoned by complainants at the hearing.

Opinion of Vice-Chancellor.

The defendants filed a counter-claim claiming damages for a breach of the covenant for quiet enjoyment contained in the deed of the premises to Philip Apter, it being alleged that the complainants had granted a lease for the summer season of 1920 to one Garfinkel and that the defendants, in consequence thereof, were unable to obtain possession and had to go out and hire other premises. They claimed, as a measure of damages, the amount of eight hundred dollars ($800), which was the rent they say they had to pay for the other premises. It appeared from the testimony that Garfinkel, the alleged tenant, was not in possession of the premises at the time of the delivery of the deed and mortgage and it was denied by the complainants and their witnesses that the tenant went into possession under an agreement with them, they having made no arrangement for letting with him. The evidence further shows that the tenant did not go into possession until three weeks after the date of the delivery of the deed and the mortgage in question. The deed and mortgage were delivered on May 18, 1920, and Garfinkel, the tenant, went into possession on June 5, 1920. The defendants permitted the tenant to remain in the premises for four months after the delivery of the deed to them and the giving of the mortgage. He was not in possession at the time of the delivery of the deed. No attempt whatsoever was made by the defendants to collect any rent. This fact is established by Garfinkel, who says the defendants never asked any rent from him. They were the owners—there was no lease of record and they permitted him to stay on the premises. The complainant Mrs. Shauinger's only interview with Garfinkel, the tenant, occurred sometime in May or April, when she told him that she had sold the property and that he could not take possession of it. He said that he had rented the property in January and would not give it up. The circumstances and evidence

would indicate that Garfinkel might be regarded as a trespasser. He entered the property under an alleged verbal lease made by Frank C. Borden, a real estate agent. Borden says he had authority to rent the premises, but the complainants deny any such authority. "A person cannot, by his own mere assertion, prove he is the agent of another." *Smith* v. *Delaware and Atlantic Telegraph and Telephone Company,* 64 N. J. Eq., page 770.

The letters of Mrs. Shauinger, many of which are undated, are in effect a direction to Borden to submit the property for letting and to bring propositions for the same to the landlord's attention. Borden sent a copy of the lease made with Garfinkel to Mrs. Shauinger, the complainant, for approval but she refused to approve it and it was never executed. It is significant that Garfinkel never signed this proposed lease. Mere authority to lease property for letting does not constitute authority to make a lease without the approval of the landlord.

It is true that Mrs. Shauinger received a check from Borden, after deducting his commissions, as a deposit for renting and, after some delay, she returned the same to him. This in itself is not sufficient to hold that the complainant had ratified Borden's act and the further evidence offered does not satisfy me that such was the case. This, with the other evidence of ratification, does not meet the rule laid down in *Lyle* v. *Addicks,* 62 N. J. Eq. 123, and other cases. Borden admits that his recollection of the transaction with Mrs. Shauinger is very dim (see pp. 14, 15 and 16 testimony).

It developed during the trial of this cause that the defendant had instituted a suit in the New York courts based on the same allegations as contained in their counter-claim and, at the time of the proceedings in this court, had not discontinued their action in New York. The New York suit was started August 11, 1920. The defendants' answer, setting up a counter-claim in this

court, was filed on September 17, 1921, so it is clear that the New York action was first instituted. I intimated at the trial that it might be within the jurisdiction of this court to compel the defendants to elect their remedy in either the New York action or in the counter-claim in this suit, but I am informed by solicitor of the defendants that since the submission of this case he has withdrawn the New York action. It is my recollection that the objection was first urged by the complainants to proceeding in this suit at the closing of argument. I shall not, however, deal with this question now as my view is that the counter-claim should be dismissed because the evidence does not sustain it.

A decree of foreclosure for the sale of the property may be accordingly entered.

Exhibit Offered by Stipulation.

the handwriting of such commissioner and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said County and Court this 19 day of May, 1920.

(L. S.)

WM. E. KELLY,
Clerk.

Received and Recorded May 24th A. D. 1920 at 8 o'clock A. M.

JOSEPH McDERMOTT,
Clerk.

State of New Jersey, }
Monmouth County, } *ss.*

I, Joseph McDermott, Clerk of said County do hereby certify, that the foregoing copy of Deed Edward M. Shauinger Et Ux to Philip Apter is true and correct as the same remains of record in my office, in Book 1113 of Deeds page 400.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said County, this 8th day of July A. D. 1921.

(SEAL)

JOSEPH McDERMOTT,
Clerk.

Final Decree.

FINAL DECREE.

Filed May 28, 1923.

This cause being opened to the Court by Autenrieth & Gannon, solicitors and of counsel with the complainants, and the pleadings and proofs having been read and the argument of counsel heard and considered, and it appearing that there is due to complainants for principal and interest on her mortgage the sum of $2,290; and

It further appearing that the defendant Philip Apter during his lifetime instituted a suit in the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, against Edward M. Shauinger and Lillian F. Shauinger, defendants, for the same cause of action which is the subject matter of the counter-claims filed by the defendants in this suit, which action is still pending by virtue of which the defendant has elected his remedy.

It is on this 21st day of May, 1923, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that the complainant is entitled to have the said sum of $2,365 with lawful interest thereon to be computed from the date hereof together with her costs of this suit, raised and paid out of the mortgaged premises; and

It is further ORDERED, ADJUDGED and DECREED that the counter-claim of the defendant filed in the above-entitled matter be and the same is hereby dismissed; and

It is further ORDERED, ADJUDGED and DECREED that so much of the said mortgaged premises as will be sufficient to raise and satisfy said debt, interests and costs be sold; and that a writ of *Fieri Facias* do issue for that purpose out of this Court directed to the Sheriff of the County of Monmouth demanding him to make a sale according to law of so much of the said mortgaged premises as will be sufficient to satisfy the said debt, interest and costs and that he pay the same to the complainant or to her solici-

tors, and that in case more money should be raised by the sale than shall be sufficient to answer such payment, such surplus money may be brought to this Court and deposited with the Clerk to abide the further order of this Court, unless otherwise previously disposed of by an order of the Court; and the Sheriff is to make return to this Court of his proceedings by virtue of the said writ; and

It is further ORDERED, ADJUDGED and DECREED that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to so much of the said mortgaged premises as shall be sold as provided by virtue of this decree; and

It is further ORDERED, ADJUDGED and DECREED that the sum of $100 be allowed and paid to the solicitors of the complainants instead of the retaining fee now allowed to counsel by statute and that the same be included in the taxed bill of costs and collected with the other items of said bill.

E. R. WALKER,
C.

Respectfully advised,

VIVIAN M. LEWIS,
V.-C.

A true copy.

JESSE R. SALMON,
Clerk.

Notice of Appeal.

NOTICE OF APPEAL.

Filed June 6, 1923.

The defendants, Olga Apter and Barney Apter, individually and as executrix and executor of the last will and testament of Philip Apter, deceased, hereby appeal from the whole and every part of the final decree made in this Court in the above-stated cause on May 28, 1923, to the Court of Errors and Appeals, the last resort in all causes.

ROTHSCHILD & ROTHSCHILD,
Solicitors for Defendants.

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

JAY LEO ROTHSCHILD,
Of Counsel with the Defendants.

Service of a copy of the within notice is hereby acknowledged this 5th day of June, 1923.

AUTENRIETH & GANNON,
Solicitors for Complainants.

PETITION OF APPEAL.

Filed June 23, 1923.

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

The petition of Olga Apter and Barney Apter, individually and as executor and executrix respectively under the last will and testament of Philip Apter, deceased, the appellants in the above-stated cause, respectfully shows that your petitioners find themselves aggrieved by the final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 28th day of May, 1923, wherein Edward M. Shauinger and Lillian F. Shauinger, were complainants, and the said Olga Apter and Barney Apter, individually and as executor and executrix under the last will and testament of Philip Apter, deceased, together with others were defendants in these respects, to wit, that the said decree adjudges that the complainants are entitled to have the sum of $2,365 with lawful interest therein; that defendants' counter-claim be dismissed; that there be a sale of the mortgaged premises barring said defendants from equity of redemption therein; and that the sum of $100 be allowed and paid to solicitors of complainants instead of the retaining fee now allowed to counsel. And your petitioners humbly appeal from said parts of the decree of the Chancellor which decrees as aforesaid on the ground that the same are erroneous for that the said defendants are in equity entitled to the relief sought in their answer and counter-claim, and that as a matter of law the Court erred in granting complainants' decree in that there was no default in any of the obligations under the mortgage of said defendants and in that there was no election of remedies by reason of the pendency of the New York action and further in that there is no evidence supporting the findings of the decree.

Your petitioners pray that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden and that your petitioners may have such relief in the premises as to this Honorable Court may seem meet.

ROTHSCHILD & ROTHSCHILD,
Solicitors for Appellants.

JAY LEO ROTHSCHILD,
Of Counsel with Appellants.

ANSWER TO PETITION OF APPEAL.

Filed June 25, 1923.

These respondents not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless say and admit that a decree was on the 28th day of May, 1923, last passed, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated, but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said decree is agreeable to equity and they pray that the same may be affirmed with costs to be adjudged to these respondents.

AUTENRIETH & GANNON,
Solicitors for and of Counsel with Respondents.

30

New Jersey Court of Errors and Appeals

Between EDWARD M. SHAUINGER and LILLIAM F. SHAUINGER, Complainants-Respondents, and OLGA APTER, *et als.*, Defendant-Appellants.	On Appeal.

BRIEF
ON BEHALF OF RESPONDENTS.

This matter is before the Court on appeal from the decree of the Court of Chancery in which the foreclosure of a mortgage was directed by the terms of the Decree.

The facts are as follows:

The complainants filed a Bill in Chancery to foreclose a mortgage bearing date May 18th, 1920, given by Philip Apter in his lifetime. The principal sum of the mortgage is $2,000.00 and bears interest at the rate of six per cent. per annum, and provides for the amortization of the principal at the rate of $250.00 in semi-annual payments during the term of the mortgage, which was for a period of three years. Mortgage encumbers premises situated at Bradley Beach (p. 48-Ex. C-1). The Bill of Complaint alleged as a breach of the terms of the mortgage, first, default in the payment of interest, second, default in the payment of installments of the principal and third

the non-payment of taxes and water rents as prescribed by the terms of the mrotgage. On the hearing it appeared that the taxes and water rents had been paid and therefore the case proceeded to trial upon the breach of the payment of the principal and interest. The defendant's answer admits the non-payment of principal and interest but denies that the non-payment thereof was equivalent to a default, and alleged by way of justification for the non-payment a counterclaim in which the defendants claim the sum of $800. damages. The entire controversy at the trial and on this appeal is concerning the counterclaim. The mortgage is a purchase money mortgage and the counterclaim arises out of an alleged breach of covenant in the deed.

It appeared that in January, 1920, prior to the giving of the mortgage in question, the complainant, Lillian F. Shauinger had placed the property at Bradley Beach, then owned by her, with one Frank C. Borden, Jr., a real estate agent, to rent for the coming season (p. 14). The property in question is situated on Madison Avenue in the Borough of Bradley Beach (Ex. D-1, p. 56). In her letter of authorization the complainant suggested that the agent endeavor to sell one of her properties in Bradley Beach. After quite some correspondence the agent forwarded to the complainant a form of lease together with a check for a deposit he had received from one Garfinkle (p. 18 and 19). The terms, however, of the proposed lease were for five months, which was longer than the season. The lease was not signed by the complainant and she informed the agent that her quoted price for the season's rent was only for three months (p. 58, Ex. D-3), and advised the agent that she would hold the lease

and his deposit until she heard further with reference to the selling of the Madison Avenue property, or the revision of the proposed lease to a shorter term. Not hearing definitely from the agent she subsequently returned unsigned, the lease on the Madison Avenue property, and the deposit which the agent had sent (p. 63, Ex. D-9), and informed him that the Madison Avenue house was for sale only. On April, 22nd, the complainant sold the Madison Avenue property to Philip Apter for the sum of $5500. through another agent and delivered a full covenant and warranty deed to him on May 18th, 1923, at which time the said Garfinkle, the alleged tenant, was not then in possession of the premises. Said Garfinkle went into possession on June 5th (p. 25) under the alleged lease, made with Frank C. Borden, Jr., which was the lease that the complainant refused to sign. The said Philip Apter, husband of Olga Apter and father of the other children, defendants in this cause, although he was the owner of the premises from May 18th, 1920, made no effort to keep the said Garfinkle out of possession and upon finding him in possession, made no effort to dispossess him during the entire season, nor to claim any rent from him, but on the contrary rented another house in Bradley Beach for the season and by his counterclaim endeavors to charge the rent of that house against the complainants' mortgage. That rent was $800 (p. 70, Ex. D-15). The test of the entire question is whether or not there was any encumbrance against the premises of the complainant at the time of the execution and delivery of the warranty deed by her to the defendants. If there was none, then clearly he could not counterclaim against the amount due on his purchase money

mortgage. That question is settled by determining the agency of the said Frank C. Borden, Jr., and whether or not any lease had been actually made by the complainant at the time the warranty deed was given to the defendants. It is not disputed that at the time of the execution and delivery of the deed, that the premises were vacant and that the defendants were free to enter into possession of the premises on May 18th, 1920, which was the date when the deed was given. On June 5th, 1920, the said Garfinkle forcibly took possession under his alleged lease.

I.

The tenant was not in possession of premises under any lease or other authority or permission of the complainant.

In order to determine whether there was a breach of the covenant of possession in the complainant's deed, it is necessary to decide whether the alleged tenant Garfinkle was in possession by virtue of any lease of the complainant's. The agent had no authority to make a binding lease for the complainant but was only a broker whose duty it was to produce a tenant ready, willing and able to rent upon terms satisfactory to complainant.

It appears that the negotiations between the agent and the complainant were opened by the agent writing to the complainant and asking if her house was for rent (p. 14) and in response to his inquiry he received a letter from the complainant stating the terms for rent of three prop-

erties owned by her in Bradley Beach for the coming season, one of which was the property in question, and further advising him that she desired to sell one of them as soon as possible. This letter also suggested that if any of the properties could be rented for a longer term than the season, she would be willing to consider that (Ex. D-1, p. 56). The complainant wrote the agent on two occasions subsequently (Ex. D-2, and D-3, p. 57 and 58) again calling his attentin to her desire to sell rather than to rent. On January 24th, the agent gave a receipt for a deposit to apply on the season's rental designating the season to be a period of five months and thereupon forwarded to the complainant the said deposit together with a proposed lease. This was rejected by the complainant (Ex. D-3, p. 58) in a letter by which she informed the agent that her terms were for three months only. Later, although she held the check and the lease, she wrote the agent several times (Ex. D-4, 5, 6, 7 and 8) in relation to the length of the term. Not hearing from him she thereupon returned the deposit to the agent and advised him that the Madison Avenue house was for sale only (Ex. D-9). Subsequently on April 27th, she entered into a contract to sell said premises, which contract was procured by another agent. The agent, Frank C. Borden, Jr., testifying for the defendants, upon being questioned as to the extent of his authority to bind the complainant to any definite term, stated when asked as to the rental season:

> Q. What is understood by that? A. Those arrangements are always made by the tenant as to the length of time they wish to occupy the property, and the landlord is the one to be

> consulted whether it is agreeable or not, and if there is no stipulation made by the landlord, the arrangement is made subject to the approval of the landlord (p. 40, l. 30).

and again as to his authority:

> Q. And all you did in this case was simply to procure a party ready and willing to lease? A. Yes, sir (p. 22, l. 9).

Then the agent stated that he had full authority to make a lease, and upon being asked why he did not sign the lease himself as agent, he stated:

> Q. Why didn't you make it in your own name as agent for Mrs. Shauinger? A. We never do that.
>
> Q. Don't you ever make leases as agent? A. No, sir.
>
> Q. In other words, you merely act as the real estate broker? A. Yes, sir (p. 21, l. 32).

It appeared that when the agent submitted the form of lease upon the terms that the proposed tenant desired to take the premises, the complainant refused to sign it (p. 21). The terms were not satisfactory and the agent therefore had not obtained his principal's approval. This agent admits that his recollection as to the entire transaction was very poor and that he had to rely upon correspondence in his possession for the extent of his authority.

It is obvious from the testimony that the authority of the agent was that only of a broker. His testimony and his recollections of the facts concerning his authority are so vague, that it cannot be presumed that he acted in any other capacity than that of broker. It is true that authority might have been conferred upon him to make a binding lease, but he does not contend that it

was, and his action in forwarding the lease to the landlord for signature, and in attempting to change the terms in accordance with the landlord's suggestion is a clear indication that he was only a broker. The rule of law is very strict with relation to proof of authority to make a binding contract. In the case of *Lindley* v. *Keim,* 54 Equity, at 422, in discussing the effect of the statute of frauds, in conferring such authority by parol, the Court says:

> "But obviously, courts should require proofs of authority conferred by parol in such case to be clear and decisive, or the wholesome provisions of the statute of frauds may be thus evaded."

He, however, by the terms of the letter of his employment, and by his entire testimony, was merely a broker for he comes clearly within the further rule expressed in *Lindley* v. *Keim, supra,* as follows:

> "The mere employment of an ordinary real estate broker to effect a sale of a parcel of land, even though the price and terms be prescribed, does not amount to giving present authority to such broker to conclude a binding contract for the same. Moreover, such authority is not usually to be inferred from the use by the principal and broker in that connection of the terms for sale or to sell and the like. Those words in that connection usually mean, no more than to negotiate a sale by finding a purchaser upon satisfactory terms."

The expression used in the above opinion "for sale or to sell and the like" might well have added to it the words "to lease" or "to let" for these have no greater significance in stating the price and terms than the words "for sale", or "to sell".

And when the complainant, in her letter, Exhibit D-1, requested the agent "to rent" or to sell her property in Bradley Beach, and gave the terms of letting, she certainly did not by the decision in *Lindley* v. *Keim, supra,* confer upon the agent the power to execute for her a binding lease, but only as he himself expressed it,

> "Q. You procure a party ready and willing to lease the property? A. Yes, sir" (p. 21).

The principle that a real estate broker has no authority to bind his principal by a written contract was again approved by the Court of Errors and Appeals in the case of *Skull* v. *Brinton,* 55 Eq. 489.

See also

Dickinson v. *Updike,* 49 Atl. 712 Ct. of E. & A.;

Stengel v. *Seargent,* 74 N. J. Eq. 20.

It must follow, therefore, that if the agent had no authority to make a binding contract, that Garfinkel, the tenant, did not have a lease of premises on June 5th, which entitled him to enter into possession. He negotiated with the agent, and as his terms were not the terms of the complainant to the agent, the complainant rejected his offer and refused to sign the lease. Therefore, on April 22nd, 1920, when the complainant and Philip Apter entered into a contract for the purchase and sale of the premises, there was no outstanding encumbrances thereon, and on May 18th, when the complainant delivered her deed to the said Philip Apter and warranted the premises to be free from all encumbrances, there was no outstanding lease against the premises. Furthermore, there was no one in possession and the warranty made as to possession was true. The said

Garfinkel was a trespasser against the said Philip Apter on June 5th when he wrongfully entered into possession of the premises. The Court below found that the evidence did not support the counterclaim and further that there was no authority in the agent to bind the complainant to a lease, and there was therefor no encumbrance on the premises at the time of the sale which would affect the collection of her mortgage (p. 81-c, p. 81-D). When it is considered that the burden of proof is on the defendants to establish the counterclaim and their sole witness as to the agency to bind the complainant to the lease is Frank C. Borden, Jr., the agent himself, who admits his recollection of the transaction is very dim (p. 20, l. 35), then clearly the Court below very properly rejected the counterclaim in its entirety. The correspondence, and his actions and conduct in submitting the lease and its terms for the complainant's approval certainly repell any inference that he had any authority to make a binding contract.

II.

Appellant's attack on the Chancellor's opinion is unwarranted.

The appellant in his brief (p. 10) states that the opinion of the Vice-Chancellor is a nullity and that there was no decision of the Court on the merits of the counterclaim. The decree by way of reference recites the bringing of an action in the Courts of New York against the complainant by Philip Apter in his lifetime and recites that such an action might be considered an election of remedy. The decree was actually signed

in May and upon the giving of a notice of appeal the Vice-Chancellor, according to practice, filed a written opinion of his findings. In this opinion the Court discussed the action pending in the New York Courts (p. 81-C, l. 34) and stated that it might be within the Court's jurisdiction to require the defendant to elect their remady either by way of counterclaim or to proceed with the New York action but then stated

> "I shall not, however, deal with this question now as my view is that the counterclaim should be dismissed because the evidence does not sustain it."

Counsel for the appellant in his brief says (at p. 10):

> "The merits were never considered—except five months later in the opinion of the Court filed for the purpose of justifying the decree, the appeal from which had already been taken to this Court."

He then characterizes the Court's opinion as follows:

> "The argument of the Vice-Chancellor, addressed to this Court, not to change the decree, but to justify the result, whether or not according to law."

Why should the Vice-Chancellor be obliged to justify his opinion and findings of fact and particularly why—"whether or not according to law"? Does counsel thereby attack the integrity of the Court's opinion or is he merely expressing himself forcibly as to the validity of the findings stated in the opinion. It is clear that there is no foundation for language of this kind in an argument before this Court.

The appellant evidently misconstrues the purpose of an opinion which is merely to express the reasons of the Court upon which the decree is based. The Constitution requires in appeals from Chancery, that the Chancellor shall inform the Court in writing of the reasons for his order or decree (Constitution of N. J., Sec. 11, Par. 5). The argument made by appellant's counsel under Point I of his brief seem to be directed to a cause where a Court, on its own motion, revises its own judgment after an appeal had been taken. Quite the contrary, the Court merely followed the practice of filing a formal opinion setting forth its findings of facts and its reasons upon which the decree proceeds, as is required by the provisions of the Constitution. For the appellant to state that no consideration was given to the merits of his counterclaim is to deliberately ignore the very elaborate discussion of the counterclaim made by the Court below contained in the Court's opinion (pp. 81-A to 81-D). There the merits are discussed at great length and the finding of fact determined against the appellant. There is no merit in the argument that the Court could not file its opinion after the notice of appeal had been served, on the ground of jurisdiction. The Constitution requires such opinion in writing at the time such appeal is heard.

In view of the Court's opinion, it is useless to discuss points 2 and 3 of the appellant's brief as they form no part of the Court's opinion as the merits of the counterclaim were determined by the Court and against the appellant.

With respect to points 4, 5, and 6, the argument concerning the lease to Garfunkle has been herein discussed and it is sufficient to say that the agent having attempted to negotiate a lease in writing

which the complainant refused to enter into, it would be illogical to find that an oral lease could be inferred. The refusal of the complainant to enter into any lease and the finding of the Court that she had not made any lease goes to the question of letting, whether the lease be considered oral, written, express or implied. The Court below found as a fact that no lease had been entered into by the complainant and that the agent was without authority to bind her in that regard.

CONCLUSION.

The defendants' admission that no payments were made on the principal and interest of the mortgage is in law a default of the terms and conditions of the mortgage, and the mortgage therefore is due. It is not a justification to set forth the alleged counterclaim to excuse the default. The only effect the counterclaim could possibly have is in reduction of the amount due. The counterclaim, however, is not established and the defendants have failed to justify their claim to any reduction, by that means, of the principal amount due on the mortgage. The Court below determined as a finding of fact that the evidence did not establish the counterclaim. The Trial Court had the benefit of observing the conduct of the witnesses on the stand and the manner of the giving of testimony.

The most that possibly can be said for the recital in the decree regarding the counterclaim is that the Court of Chancery should perhaps state in detail in its decree the findings contained in its opinion, viz.: that the defendants have failed to prove their counterclaim on the merits and

have not sustained the burden of proof in that respect and for that reason the counterclaim should be dismissed.

It is respectfully submitted that its finding of facts in this regard should not be disturbed and that the decree of the Court directing the foreclosure of a mortgage for the full amount of the principal and interest be affirmed.

AUTENRIETH & GANNON,
Of counsel with Complainants-Appellees.

30

New Jersey Court of Errors and Appeals.

Between

EDWARD M. SHAUINGER and LILLIAN F. SHAUINGER,
Complainants-Respondents,

and

OLGA APTER, BARNEY APTER, MRS. APTER, his wife; ELIZABETH GOLDSTEIN, MR. GOLDSTEIN, her husband; ELI M. APTER, MRS. APTER, his wife; OLGA APTER and BARNEY APTER, as Executrix and Executor of the Last Will and Testament of Philip Apter, deceased,
Defendants-Appellants.

On Bill, etc.,
On Appeal from
Final Decree
in Chancery.

APPELLANTS' BRIEF.

Statement.

Defendants, Olga Apter and Barney Apter, individually and as executrix and executor of Philip Apter, deceased, appeal from a final decree in chancery (S. C., p. 82) ordering a foreclosure of complainants' purchase money mortgage on defendants' property and dismissing defendants' counterclaim for damages sustained by reason of the breach of complainants' covenant of quiet possession, contained in the deed of the property (exhibit offered by stipulation, S. C., p. 77).

The Vice-Chancellor dismissed the counterclaim because he found that defendants had made an election of remedies (S. C., p. 82, ll. 10-20) by reason of the prior institution in the New York courts of an action at law for the same subject matter as involved in the counterclaim. The decree to such effect was filed May 28, 1923 (S. C., p. 82) and defendants filed notice of appeal therefrom on June 6, 1923 (S. C., p. 84). Five months later, and on November 2, 1923, the Vice-Chancellor filed an opinion, attempting to modify the decree, by explaining that the dismissal of defendants' counterclaim, which had been an accomplished fact for five months, *would be* on the merits (S. C., p. 81d, ll. 10-20).

It is, therefore, necessary to consider the facts of the case.

The Facts.

Complainants were residents of Brooklyn, New York, and the deceased, Philip Apter, a resident of Newark, New Jersey (Exhibit D 15, S. C., p. 68, l. 10). On April 22, 1920, complainants and said Apter made an agreement for the sale to Apter of a dwelling house on Madison Avenue, Borough of Bradley Beach, Monmouth County, New Jersey. Apter agreed to pay $5,500, of which $2,000 was to be represented by a purchase money mortgage for three years, with interest at six per cent., to be amortized $500 annually (Exhibit D 15, p. 69).

Complainants agreed to convey the premises by warranty deed free from all encumbrances (Exhibit D 15, S. C., pp. 68 and 69). On May 18, 1920, complainants conveyed the premises by said warranty deed (Exhibit, S. C., p. 77),

and the said Apter executed the purchase money mortgage for $2,000 (Exhibit C 1, S. C., p. 48).

Both at the time of making the contract and of the conveyance of the said premises there was an encumbrance thereon in the shape of a lease for a period of five months given by complainants to one Garfinkle (Exhibit D 13½, S. C., p. 67). Said Garfinkle was not in possession of the premises nor did he go into possession of the premises until the end of May, or the beginning of June, 1920 (S. C., p. 25, l. 40) but he was already in possession when Apter attempted to possess himself of the premises (S. C., p. 26, l. 10; p. 31, l. 10). Because said Apter was unable to get possession of the premises he was obliged to rent other premises for the year (S. C., p. 31).

Before the commencement of this action and on February 27, 1921, Apter died.

The damages thus sustained were the basis of the counterclaim (S. C., pp. 8-10). The defendants sought, prior to the institution of this suit, to offset the amount thereof against the sums due for interest and principal, and repeated that effort even after action commenced, but the offer was rejected (Exhibits D 19, D 17 and D 18, S. C., pp. 75, 73 and 74, also p. 33). The only default pressed as justification for foreclosure, was non-payment of interest and principal. Apparently complainants realized that their own bad faith had caused the default in taxes, as alleged in the answer (S. C., pp. 7-8) and therefore, withdrew that claim on the trial (S. C., p. 34, l. 20).

The only issue of fact litigated upon the trial, therefore, was whether Garfinkle had a valid lease of the premises conveyed by complainants by warranty deed to Apter. On the trial, the Vice-Chancellor refused to determine that issue

of fact. He held that defendants had debarred themselves from asking equitable relief, by electing a legal remedy (S. C., p. 41, l. 22; decree, p. 82).

The material facts with respect to the making of complainants' lease with Garfinkle were as follows:

Frank C. Borden, the Mayor of Bradley Beach (S. C., p. 14, l. 20), had been doing business for complainants for years (S. C., p. 15, l. 21). On January 5, 1920, Mrs. Shauinger had authorized him to rent the Madison Avenue property for the summer season at $400 net (Exhibit D 1, p. 56, l. 19) and in that letter she said, "If you can get more by renting for a *longer* season I will appreciate it as I mentioned I need the money." Subsequently she wrote him that she would also like to sell the Madison Avenue property because "You know I need the money * * *" (Exhibit D 2, p. 57, l. 18). On January 24, 1920, she advised Borden that the price of Madison Avenue would be $5,000 *"but if sold now party who is interested to receive this season's rental"* (Exhibit D 3, p. 58). Thus the rental for the season was a part of the campaign to sell the house. Borden, *pursuant to* Mrs. Shauinger's instructions, obtained more than $400 rental for the season. He procured from Garfinkle $450 (Exhibit D 13½, S. C., p. 67). Then Mrs. Shauinger complained that she wanted more rent (Exhibit D 3—2nd, S. C., p. 58) though she had previously authorized a rental of $400 (Exhibit D 3, S. C., p. 58) and had asked Borden to rent for a longer season than normally. Nevertheless, she held Garfinkle's leases which had been mailed her and also Borden's check for the

deposit thereon (Exhibit D 3—2nd, S. C., pp. 58-59). Garfinkle had paid Borden $100 as deposit (Exhibit D 13½, S. C., p. 67). Borden had sent complainants his check dated January 20, 1920, No. 3347 for $93.75 which was deposited by complainants, bearing their endorsements. The check of $93.75 represented deposits on Madison Avenue as well as another house (S. C., p. 19, ll. 1-12; Exhibit D 11½, S. C., p. 66) less Borden's commissions of $33.75, the total remitted on account of the Madison Avenue property being $66.25 (S. C., p. 44, ll. 6-11). Subsequently Mrs. Shauinger wrote Borden that she had a party who wanted to *buy* the Madison Avenue property (Exhibit D 4, S. C., p. 59). Then suddenly, Mrs. Shauinger discovered she could not rent the house for more than three months, and she left Borden as sole agent to get a rental of $500. She argued, "The more rental you get the more commission you get, so it works both ways" (Exhibit D 5, S. C., p. 60). Previously, she had authorized a rental of $400 and invited rental for a longer period for more (Exhibit D 1, p. 56). Then she had complained because only $450 had been obtained (Exhibit D 3—2nd, S. C., p. 17). Now she insisted the period should be only three months, and the rental $500. *But she continued to keep the leases sent her, and the money on deposit.* On the trial, Mrs. Shauinger said, "The price was not objectionable; I did not mind renting the house for three months, but not for five months; that is our trouble" (S. C., p. 42, ll. 37-40). No wonder that in her next letter, she confesses she does not know what to do, that she needs the money "and may get desperate, but I want to treat you fair," and finally "* * * I seem to get 'in dutch' every season

about something as I am so far away" (Exhibit D 7, S. C., p. 61). So also she later writes for information indicating she may get out of her bargain (Exhibit D 8, S. C., p. 63). Finally, on April 3 (S. C., p. 19, l. 30) Mrs. Shauinger wrote Borden enclosing a check for $56.25, saying that she could not get her husband to sign the leases, because "He is *not* going to rent Madison at all but *sell.*" *She suggested Mr. Borden might get his client to buy at $5,500* (Exhibit D 9, S. C., p. 63) which was the price she later got from Apter. Mrs. Shauinger did not return the leases, and kept part of the deposit even after sending the check for $56.25. The correct amount less commissions was $66.25 (S. C., p. 44, ll. 6-11). Besides Garfinkle was not chargeable with Borden's commissions.

On April 13, 1920, Mrs. Shauinger again wrote Borden for word that she had extricated herself from the mess of her own creation (Exhibit D 10, p. 65, erroneously dated November 13, 1920). She confessed, "I am in a quandary as to where I am at" and weakly suggested she had not signed any leases. The *sale* of the property was uppermost in her mind (Exhibit D 10, S. C., p. 65). Nine days later she signed the contract for the sale of the Madison Avenue property to Apter (Exhibit D 15, S. C., p. 68, executed April 22, 1920). Mrs. Shauinger admitted that prior to April 3 (the date when she returned the deposit to Borden) she had authorized another agent, a Mrs. McNeely, to sell the property (S. C., p. 45, ll. 17-21). Mrs. Apter testified that she had commenced negotiations with Mrs. McNeely for the purchase of the property in the latter part of March or the beginning of April (S. C., p. 46, ll. 8-12, 30-35), and that it was not April 15 (S. C., p. 46, ll. 36-37)

The reason for the change in attitude on the part of the complainants is, thus, obvious. The lease for the summer to Garfinkle, interfered with the sale of the premises to Apter. Mrs. Shauinger naively states that herself. "* * * I knew I could not sell the house with a lease on it, and I gave no lease; I never gave any lease" (S. C., p. 44, ll. 37-40). *But the determination to sell was made after the lease was consummated.* Therefore, complainants repudiated their obligation to Garfinkle, deceived Apter, and attempted thus to undo what had been accomplished with their knowledge and approval.

Garfinkle testified as follows:

> "Some time prior to the time I had taken possession—I do not remember whether it was May or April, Mrs. Shauinger came to see me at Elizabeth at my place of business and told me that she had sold the property, and that I could not take possession of the property, and that she *would return my check,* and I told her I had rented the property in January when rentals were easier to be had, and I did not see my way clear in giving up possession of the property when I had leased it, and go and pay more money for rentals, and I told her I should hold her to the lease" (S. C., p. 25, ll. 9-21).

It will be noted that at the time of this conversation, the check for deposit had not yet been returned. *Garfinkle never received it.* It was sent to Borden, who kept it and never cashed it. *Mrs. Shauinger never denied this conversation.*

Garfinkle further testified that on June 2, he sent Borden a check for $175 and $10 for deposit for gas on account of the rent of the premises:

that Borden returned the check with the suggestion he mail the same to Mrs. Shauinger; that he did so; that receipt was never acknowledged and the check had never been returned (S. C., p. 26, ll. 20-30).

Mrs. Shauinger failed to deny receipt of that check.

Mr. Borden received a commission for renting (S. C., p. 23, l. 12) and Mrs. Shauinger made no complaint that it was unearned, or any attempt to get the amount thereof back.

The undisputed facts, therefore, are:

1. Borden was authorized to rent at $400 or more if for a longer term.

2. Borden was paid a commission for renting and no objection to the payment of said commission was ever made by complainants.

3. Complainants had knowledge of the entire transaction from the beginning.

4. Complainants kept Garfinkle's deposit of $100 less Borden's commission of $33.75 for practically three months and have retained $10 of that amount even to date.

5. No attempt to repudiate the transaction was ever made until negotiations for the sale of the property to another party through another agent were already in progress.

6. Mrs. Shauinger conceded her own obligation in her conversation with Garfinkle at Elizabeth, the substance or truth of which she never denied.

Specifications of Error.

This appeal takes a twofold aspect by reason of the filing of the Vice-Chancellor's opinion five months after the filing of the decree. The decree dismisses defendants' counterclaim for reasons entirely unconnected with the merits. The opinion seeks to justify the decree and enlarge its scope by dismissing the counterclaim on its merits.

Appellants therefore contend as follows:

1. The opinion of the Vice-Chancellor is a nullity; there was no decree on the merits.

2. There was no election of remedies, and defendants were not barred from relief on their counterclaim in equity.

3. The counterclaim was properly interposed and should have been considered on its merits.

4. The lease to Garfinkle for five months was not required to be in writing, nor to be recorded.

5. The lease to Garfinkle being a valid one, and therefore an encumbrance on the premises, it is immaterial that he was not in actual occupation of the premises when title was conveyed to Apter.

6. Complainants authorized the lease to Garfinkle, approved and ratified the same with knowledge of the *entire transaction* and repudiated their obligations after they had been consummated.

POINT I.

The opinion of the Vice-Chancellor is a nullity; there was no decree on the merits.

The decree reads:

> "It further appearing that the defendant Philip Apter during his lifetime instituted a suit in the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, against Edward M. Shauinger and Lillian F. Shauinger, defendants, for the same cause of action which is the subject matter of the counterclaim filed by the defendants in this suit, which action is still pending *by virtue of which the defendant has elected his remedy.* * * *
>
> It is * * * Ordered, Adjudged and Decreed that the Complainant is entitled to have the said sum of $2,365 * * * and
>
> It is further, Ordered, Adjudged and Decreed that the counterclaim of the defendant * * * be and the same is hereby dismissed * * *."

The dismissal of the counterclaim was therefore *not* on the merits. The merits were never considered—except five months later, in the opinion of the Court, filed for the purpose of justifying the decree, the appeal from which had already been taken to this Court. The opinion, therefore, was not the written judicial process which led to the making of the decree, but the argument of the Vice-Chancellor addressed to this Court, not to change the decree, but to justify the result, whether or not according to law. So the Vice-Chancellor states in his belated opinion:

"I shall not, however, deal with this question now as my view is that the counterclaim should be dismissed because the evidence does not sustain it" (S. C., p. 81d, ll. 13-16). *But the counterclaim had already been dismissed without a consideration of the merits.* The decree closed the case and the appeal to this Court ended the power of the Court of Chancery to alter or amend it.

> "The purpose to be accomplished by a decree in equity is to finally settle and determine the rights of all persons interested in the subject-matter of the suit. See the remarks of Vice-Chancellor Van Fleet in *Jones* v. *Davenport*, 45 N. J. Eq. 77 (reversed 46 N. J. Eq. 237, but not on this point). On final hearing but *One* decree is entered, no matter how numerous the parties or the issues."
>
> (Chancellor Walker in *Beall* v. *New York and New Jersey Water Co.*, 87 N. J. Eq. 390, 393.)

> "The great purpose intended to be accomplished by a final decree in an equity suit is to settle and determine, justly and finally, the rights of all persons having a material interest in the subject-matter put forward by the complainant in his bill of complaint as the foundation of his right to relief. * * *
>
> *Final decrees in equity have, in consequence, from a very early date, been held, so far as the power of the courts making them was concerned, to be unalterable in any material respect, not covered by the judgment in the particular case,* except the alteration is sought by bill of review or a rehearing. Lord Bacon's first ordinance declares that no decree shall be reversed, altered *or explained*, being once under the

great seal, but upon a bill of review. Beames Orders 1. By both the ordinance of Lord Cornbury and that of Governor Franklin the ordinances of Lord Bacon were made the law of this court. Those ordinances both ordain, that the court of chancery established in the province or colony of New Jersey, shall hear and determine all causes and suits, which come before it, as near as may be according to the usage and custom of the high court of chancery in the Kingdom of England. 4 C. E. Gr. 579. As a rule of practice, the ordinance of Lord Bacon above quoted, is adhered to wherever equity jurisprudence is administered. Judge Story says that it has never been departed from (Story Eq. Pl., p. 404), and Mr. Daniell says that a decree which has been enrolled is not susceptible of alteration except by the House of Lords or by bill of review. 2 Dan. Ch. Pr. 1019."

(Vice-Chancellor Van Fleet in *Jones* v. *Davenport*, 45 N. J. Eq. 77, 82; reversed on other grounds in 46 N. J. Eq. 237 and referred to with approval by Chancellor Walker in *Beall* v. *N. Y. & N. J. Water Co.*, 87 N. J. Eq. 390, 393.)

This Court holds that the filing of the notice of appeal removes the whole proceeding from the lower court and *ipso facto* gives exclusive jurisdiction to the Court of Errors and Appeals.

"We think that it is the notice of appeal in the court of chancery that is possessed of complete appellate efficacy, so much so, that when such notice has been filed, the cause to which it relates is, *ipso facto*, placed under the control of this court. The language of the rules of the court, existing from the earliest times, can-

not be harmonized with any other view. The petition of appeal subsequently filed in this court is in the nature of a pleading tending to form an issue."

Barton v. *Long*, 45 N. J. Eq. 160.

A supplemental opinion of the lower Court formulated after reargument constitutes no part of the case.

"Where a case has been argued in this court, and the reasons why the decree is made or the judgment is entered have been submitted to us in the shape of an opinion of the lower court (pursuant to the constitutional requirement) and a reargument of the whole case, or any portion thereof, is afterward ordered by this court, a supplemental opinion of the lower court, formulated after the reargument has been ordered containing additional reasons for the making of such decree or the entering of such judgment, constitutes no part of the case before us, *unless sent up in pursuance of the request of this court.*"

(*Varrick* v. *Hitt*, 65 N. J. Eq. 778.)

"After decree the proceedings are under the control of the court and will only be opened in order to prevent fraud or mistake."

(*Consolidated Electric Storage Co.* v. *Atlantic Trust Co.*, 50 N. J. Eq. p. 93;)

(*Hudson Trust Co.* v. *Boyd*, 80 N. J. Eq. 268-9.)

A decree has the same force and effect as a judgment at law.

"A decree of this court is a judgment from its date. (*Hazen* v. *Durling*, 2 N. J.

Eq. 133.) A final decree of this court when made and filed is certainly as much of a judgment as is a final judgment of a court of common law a judgment of such court. It is so provided in the Chancery Act."

(*Hudson Trust Co.* v. *Boyd,* 80 N. J. Eq. 268, 273.)

"The decree of the court of chancery shall, from the time of its being signed, have the force, operation and effect of a judgment at law in the Supreme Court, from the time of the actual entry of such judgment; and all decrees and orders of the Court of Chancery, whereby any sum of money shall be ordered to be paid by one person to another, shall have the force, operation and effect of a judgment at law in the Supreme Court, from the time of the actual entry of such judgment and the Chancellor may order such executions thereon as in other cases * * *."

(Compiled Statutes, p. 425, Par. 44.)

The decree, therefore, just as a judgment, must contain the adjudication within its own terms.

That the opinion should precede and not follow the decree follows necessarily from a consideration of its function. It certainly occupies no more favorable position in orderly judicial process than findings of fact.

"Findings of fact constitute a well recognized step in equity practice. They embrace the substance of the conclusions drawn by the trial Court from the evidence, and furnish the foundation on which the decree rests. The decree is a subsequent step, being the adjudication of the Court upon the issues raised."

(*Smith* v. *Smith,* 222 Mass. 102, 103.)

Bank of Commerce v. *Tennessee,* 163 U. S. Pages 416, 420-421, illustrates the necessity of looking only to the judgment of the Court to determine what has been adjudicated. In that case the United States Supreme Court considered whether there was a Federal question to review. It said, criticising its own error, in looking to the opinion instead of to the judgment:

> "In coming to that conclusion and in reversing the whole judgment we think this Court inadvertently fell into error. The error consisted in mistaking a certain statement in a portion of the opinion of the Court below for the judgment which it actually rendered. * * * In the determination of that question no effect can be given the *opinion* of the State Court *in favor* of the plaintiffs in error upon one ground so long as it is rendered entirely immaterial by the *judgment* of that court *against* the plaintiffs in error upon another ground. * * * Even if the opinion of the State Court were a part of the record, as is claimed by counsel for the plaintiffs in error no different result would follow on that account. Being a part of the record merely gives the Court a right to look into these opinions for the purpose of discovering the ground upon which the judgment of the Court actually proceeded."

In our case the opinion conflicts with the decree. It was written and filed after the decree. The reasoning of the Court in the *Bank of Commerce* case would therefore seem to apply *a fortiori.* It would be a practice fraught with grave possibilities, to permit an opinion to be considered in support of a decree from which there has been an appeal, which was not the basis

for and the precursor of said decree. Such practice would constitute the Court appealed from both the Court appealed from and counsel for respondent as well as authorize action on its part beyond the limits of orderly procedure according to law.

POINT II.

There was no election of remedies and defendants were not barred from relief on their counterclaim in equity.

The decree recites that the New York "action is still pending by virtue of which the defendant has elected his remedy" (S. C., p. 82, Lines 19-20).

There is no such evidence in the record.

The record shows that "Prior to the commencement of this suit, defendants herein were plaintiffs in an action in the Municipal Court of the City of New York, wherein the complainants were defendants" (S. C., Stipulation, p. 76, Paragraph 1). There was no statement that the action was still pending. The opinion aggravates the unsupported statement by again going outside the record to say that "I am informed by solicitor of the defendants that since the *submission* of this case, he has withdrawn the New York action" (S. C., Opinion, p. 81d, l. 10). Recognizing the impropriety of going outside the record, a transgression of the rule is perhaps justifiable to correct a possible erroneous conclusion from a similar transgression by the Court. The fact is that the New York action was dis-

continued before the submission of the cause to the Vice-Chancellor.

But even assuming the facts as stated in the decree the precedents are unbroken in a long line beginning with *Conover* v. *Conover,* 1 N. J. Eq. 403, that where there is an action in equity pending for the same cause and for the same relief as an action at law, the most that can be done is to direct the complainant to elect between his remedies and then proceed.

In *Conover* v. *Conover,* 1 N. J. Eq. 403, the action was to recover certain amounts charged on lands. After final hearing the defendants objected that since there was a suit for the same matter pending undetermined between the parties in the Court of Common Pleas, the bill should be dismissed, but Chancellor Vroom held otherwise. He stated at page 409 as follows:

> "That this Court can take no cognizance of it at this time, inasmuch as there is a suit for the same subject matter pending undetermined between the same parties, in the Court of Common Pleas of the County of Monmouth. This is set up and insisted on in the answer, in lieu of the formal plea in bar. The practice is, where the party sues both at law and in equity for the same thing, he will be put to his election in which court he will proceed, but need not make his election until after the defendant has answered. If he elects to proceed at law, or neglect to make his election in proper time, his bill is to be dismissed: *Jones* v. *Earl of Strafford,* 3 P. Wms. 90; note B. Anon., 1 Ves. Jr. 91; Mitf. P. 91; *Rodgers* v. *Vosburgh,* 4 John. C. R. 84; *Boyd* v. *Heingelman,* 1 Ves. and B. 381; Beam. P. in E. 150, 151. *In this case there has been no order putting the*

party to his election, nor any application for such order so far as I am informed. The proceedings in this respect have not been altogether formal, but an election has been made in fact. No steps have been taken in the suit at law. Testimony has been taken on both sides in this Court relative to the very claim for which the action was brought, and the suit has proceeded here without objection. I think it would be entirely too technical, under these circumstances, to say that the complainants should be turned out of this Court and driven to pursue their remedy at law. They will be considered here as having made their election, and must abide the result. Any further proceeding at law will be stayed by injunction."

To the same effect are:

Freeman v. *Staats*, 8 N. J. Eq. 814;
Way v. *Bragaw*, 16 N. J. Eq. 213.

The last mentioned case is particularly illuminating. It shows that the plea of another action pending has no application except to a case where the action is pending in the same court or in another *equity* court. That is certainly not the case here. It also shows that the remedy must be as beneficial, which is also not the case here. In the equity case the defendant may abate the amount due on the mortgage. He is not regarded to be relegated to an independent action, which may never result in satisfaction of his judgment.

It needs no argument to demonstrate that such a remedy is more efficacious than the best judgment at law, of which there is no guaranteed satisfaction.

In *Central Railroad Company of N. J.* v. *N. J. West Line Railroad,* 32 N. J. Eq. 67, there was a bill to enjoin the sale under decree of foreclosure. It appeared that a suit was pending in the United States Circuit Court for the same district, and in that suit a preliminary injunction had been obtained, which had lapsed. The suit in chancery was identical in every respect. A motion was made to compel an election and an election was compelled. The Court stated:

> "A complainant who has two suits, one at law and the other in equity, or both in equity, pending for the same cause, at the same time, will be put to his election, *except in the case of foreclosure of mortgage, in which case both a suit at law and a suit in equity, at the same time may be maintained.* Story's Eq. Pl. page 736; *Way* v. *Bragaw,* 1 C. E. Gr. 213; *Conover's Ex'rs* v. *Conover,* Sax. 403; *McEwan* v. *Brodhead,* 3 Stock. 129; *Moore* v. *Grubbs,* 3 B. Mon. (Ky.) 77; *Brown* v. *Wallace,* 2 Bland 585, 601. And the defendant may call for the election as soon as he has filed his answer."

In discussing the question the Court pointed out that an action pending in a foreign court (as in the case at bar) was not a bar to the action in equity, but that the most that could be done was to compel an election.

> "The right to put the complainant to an election is not confined to suits brought in our own courts; but he may be compelled to elect whether he will proceed in this or in a foreign court. 1 Hoffm. Ch. Pr. 343; 1 Barb. Ch. Pr. (2nd revised) 247; *Peters* v. *Thompson,* Cooper 294."

The notes to this case are interesting and informative because they sum up the law of the

situation. On page 72 of the opinion there is a note to the effect that the pendency of another suit cannot be shown without pleading it.

In the case at bar there is nothing in the pleadings on the New York proceedings.

Similarly and in accord with the foregoing authorities are:

Peter Breidt City Brewing Company v. *Tomaine,* 40 N. J. L. 20;
Jenkins v. *Smith,* 14 R. I. 634;
McKenzie v. *A. P. Cook Co.,* 113 Mich. 452.

In any event, the Vice-Chancellor emphasizes that "the objection was first urged by the complainants to proceeding in this suit at the closing of argument" (S. C., p. 81d, l. 10ff.).

The objection then made certainly had no force whatsoever.

Polhemus v. *Holland Trust Co.,* 61 N. J. Eq. 654;
Seymour v. *Long Dock Co.,* 20 N. J. Eq. 396.

Nothing short of the operation of the rule of *res judicata* could bar defendants' counterclaim.

Roarke v. *Roarke,* 77 N. J. Eq. 181.

POINT III.

The counterclaim was properly interposed and should have been considered on its merits.

The proposition that the counterclaim is maintainable in this action since it seeks to recover for the violation of a covenant contained in the deed conveying the property requires no extended argument. Ever since the case of

Kuhnen v. *Parker*, 56 N. J. Eq. 286,

it has been the settled law that in a foreclosure action the mortgagor, seeking to foreclose a purchase-money mortgage, may counterclaim for damages, liquidated or unliquidated, caused by the breach of the covenant for quiet enjoyment. In the case at bar, the mortgage sought to be foreclosed was a purchase money mortgage. The covenant broken was the covenant for quiet enjoyment. The damages were unliquidated, but were proved upon the trial, without an effort on the part of the complainants to disprove them, to amount to $800.00. Indeed, complainants counsel readily stated to the Vice-Chancellor that defendants had "Proven their case on the theory of damage" (S. C., p. 47, ll. 4-6). Such proof was furnished by the expert testimony of Borden as to the value of the lease at No. 406 Madison Avenue, Bradley Beach, New Jersey (S. C., pp. 40-41), and by the testimony of Miss Rogers that that was the amount paid when their house was rented by defendants' deceased after he could not obtain possession of his own property. (S. C., pp. 39-40;Exhibit D 15—2nd, S. C., p. 70.)

POINT IV.

The lease to Garfinkle for five months was not required to be in writing, nor to be recorded.

Leases for less than three years are valid though not in writing.

Compiled Statutes, page 2610, Paragraph 1, reads as follows:

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

Georgette v. *Steuber,* 80 N. J. L. 482;
Pfeiffer v. *Peters,* 80 N. J. L. 661;
Sayre v. *Roseville Motor Co. et al.,* 85 N. J. L. 10.

The lease to Garfinkle was for only five months, and thus clearly enforceable.

Since the lease was for less than two years it was not entitled to be recorded.

Compiled Statutes, p. 1541, Paragraph 21, P. L. 1898, p. 677, are as follows:

> "All deeds or instruments * * * affecting the title to any lands, tenements or hereditaments * * * or any interest therein may be acknowledged or proved and then recorded * * * that is to say * * * leases for life *or any term not less than two years* * * *."

It is, therefore, difficult to understand why the Vice-Chancellor attached any significance to the fact that the lease was not recorded. (Opinion, S. C., p. 81b, ll. 32-34.)

Besides, the recording statutes give constructive notice, for the purpose of protecting innocent purchasers and creditors. They do not protect fraudulent sellers who break the *warranties* contained in their deeds of conveyance.

POINT V.

The lease to Garfinkle being a valid one, and therefore an encumbrance on the premises, it is immaterial that he was not in actual occupation of the premises when title was conveyed to Apter.

The Court emphasizes the fact that the tenant Garfinkle did not go into actual possession of the premises until three weeks after delivery of the deed and mortgage. (S. C., p. 81b, l. 20.) It suggests that Garfinkle might be regarded as a trespasser. (S. C., p. 81c, l. 1.) The answer to that question obviously rests upon the result of the inquiry into whether Garfinkle had a valid lease, which in turn rests on the evidence as to Borden's authority and complainants' acts. These

questions we have discussed in our opening statement of facts and will again consider below (Point VI). But it is difficult to conceive what importance may be attached to the fact that Garfinkle was not in possession of the premises when the deed was delivered. The liability of complainants on the counterclaim is because of their warranty against encumbrances and irrespective of any question of notice of the encumbrance. Since Garfinkle was not in possession at the time of delivery of the deed, certainly, Apter had no notice of Garfinkle's rights. That Garfinkle went in afterward, assuming he had a valid lease, confirms plaintiffs' responsibility rather than minimizes it.

Certainly, whatever the facts were, there is and can be no claim that complainants did not know them. Indeed, the evidence is that complainants interviewed Garfinkle to urge him to cancel his lease (S. C., p. 25, l. 10), and thus precipitated his taking possession at a date earlier than would otherwise have been. (S. C., pp. 25, 26, ll. 40ff.)

In any event, the date when Garfinkle took possession is of no importance and is irrelevant in the absence of any contention that complainants were ignorant of Garfinkle's rights.

The suggestion that defendants should have made efforts to remove Garfinkle (Opinion, p. 81b, ll. 32-34) is of no greater weight. It begs the question as to Garfinkle's rights, throws the burden on defendants instead of complainants who warranted against what was the fact, and ignores the fact of which this Court may take judicial notice, that defendants' only remedy of ejectment, in June, 1920, was no remedy at all, because no disposition of the matter could have been made before the termination of Garfinkle's lease.

POINT VI.

Complainants authorized the lease to Garfinkle, approved and ratified the same with knowledge of the entire transaction, and repudiated their obligations after they had been consummated.

(a) *Borden was authorized.*

Our discussion of the facts, which need not be repeated here indicates clearly that Borden acted exactly within his authority. He rented the Madison Avenue property for $450, which was more than the figure of $400 given him. Complainants' disapproval came concurrently with a determination on their part to *sell* rather than *lease* the premises, because they realized that a lease on the premises for the summer would reduce the sales value of the house. But when the repudiation came, the obligation of the lease had long been an accomplished fact. The lease had been made in January. The deposit had been retained in full up to April. It was only then that complainants faced about, bent on another policy. But that was too late.

(b) *Complainants vainly repudiated the consummated lease.*

It is elementary that a contract once made cannot be modified or abrogated except by mutual consent.

> "Persons competent to contract can as validly agree to rescind a contract already

made as they could agree to make it originally. However, as a contract is made by the joint will of two parties, it can be rescinded only by the joint will of the two parties. It is obvious that one of the parties can no more rescind the contract, without the other's express or implied assent, than he alone can make it."

(*Ruling Case Law,* Volume 6, par. 304.)

"If one party to a contract furnishes a legal ground for rescission, his assent to a rescission declared by the other is unnecessary, *but in the absence of such ground all the parties to the contract must assent to its rescission and there must be a meeting of their minds.* Hence one party to a contract cannot rescind it by merely giving notice to the other of its intention to do so; *the offer on the one side must be accepted on the other, such offer and acceptance being governed by the same rules as govern the inception of contracts generally,* as, for example, when the offer is made by mail."

(13 *Corpus Juris* 601, par. 624, subd. 4.)

"Either party to a contract may perform his part of it, and charge the other party with liability thereunder, without the further consent or acquiescence of the other; but the subsequent agreement or acquiescence of both the parties is requisite to cancel the contract or to relieve either party from its obligation."

(*Central Coal Co.* v. *Good,* 120 Fed. 793, 797.)

(c) *Borden's testimony was entitled to weight.*

The statement of the Vice-Chancellor (S. C., p. 81c, ll. 8-10) with reference to Borden's authority, that "A person cannot by his own mere assertion prove he is the agent of another" (quoting from *Smith* v. *Delaware and Atlantic Telegraph & Telephone Company,* 64 N. J. Eq. p. 770) may be conceded. It has no bearing on our case. Borden's authority was not proved by his *declarations,* but his *testimony* and complainants' own letters and testimony. That certainly was proper.

> "The rule that the declarations of an agent are, as against his principal, inadmissible to prove the fact of his agency does not apply to his testimony as a witness on the trial in which such fact is in issue; and consequently the testimony of the agent, unless he is disqualified for some other reason, is competent to establish the fact of his agency, and the existence of facts from which the agency may be inferred, at least where the authority was verbally conferred; and to refuse to allow him to testify and be cross examined is reversible error."
>
> (2 *Corpus Juris* 933, sec. 689 citing *Colloty* v. *Shuman, Prosecutrix,* 75 N. J. L. 97.)

(d) *The lease was ratified.*

Respondents contend, however, that the transaction was never authorized, therefore never consummated, and, of course, therefore never ratified. Assuming, but not conceding, that the contract was never authorized, the law applied to the undisputed evidence of the case, compels the conclusion that the contract was ratified.

In *Lyle* v. *Addicks,* 62 N. J. Eq. 123, the facts were as follows: The complainant and defendant were engaged in resurrecting an insolvent corporation. To do so they made mutual promises in writing. In consideration of the complainant assigning shares he held in the company, assigning claims he owned, and giving a general release and help in reorganization, the defendant offered to do everything toward securing the court sanction to reorganization and besides to give the complainant three notes for $5,000 each endorsed by reputable parties with interest thereon. This agreement was signed by the complainant in person and by the attorney for the defendant. Thereafter the defendant defaulted and complainant went into court to enforce the agreement. He contended that the agent had no authority to bind him, that his agency was limited, that he had gone beyond his authority. The Court held:

> "Where defendant on learning of execution of agreement by another in his name as attorney in fact, failed to notify complainant of his repudiation thereof, and did not object to the agreement on the score of want of authority while action on his offer was pending, and while complainant was to his knowledge acting on the belief of the agreement's validity such conduct amounted to such ratification of the authority to sign the agreement as to make defendant liable for a breach thereof."

In the case at bar, complainants never notified Garfinkle of the repudiation of his lease—at least not until it was long an accomplished fact—and never questioned Borden's authority to make the lease. On the contrary, Mrs. Shauinger, in April, 1920, told Garfinkle she had *sold* the property

and offered to return his check (S. C. p, 25, ll. 10-20). That certainly was not *repudiation*, but on the contrary *recognition* of the contracts and ratification inherent in the very substance of the attempt to cancel the admitted obligation.

Conclusive evidence of ratification is to be found in complainant's retention of Garfinkle's deposit.

> "The rule of ratification by the acceptance of benefits implies the power of election to accept or reject what has been received, and where the principal has suffered no prejudice and can make restitution, he should, when he is apprised of the facts, make his election, and if he decides not to ratify he should return the fruits of the unauthorized act, and if he does not do so within a reasonable time, but retains, uses, or disposes of what he has received, he will be held to have ratified the act of the agent, unless such restoration would be of no practical value to the other party. This rule applies notwithstanding a previous denial, upon learning the facts, of the agent's authority, or expressions of disapproval or repudiation of his act."
>
> (2 *Corpus Juris* 496, Sec. 116, citing *Wright* v. *Vineyard M. E. Church*, 72 Minn. 78, 74 N. W. 1015; *Stetson-Preston Co.* v. *Dodson* (Civ. A), 103 S. W. 685.)

In *Lyons* v. *Wait*, 51 N. J. Eq. 60, two sisters owned property as joint tenants. They authorized the broker to sell this property for them. The broker sold the property to the complainant and signed the agreement to sell with his name, and the complainant signed his. Thereafter the sisters objected to the sale, there being a question as to

whether they could convey all that the broker had sold. The Court held that even though the paper had not been perfectly executed at the beginning to bind the sisters it was considered good because since execution they had ratified it by their subsequent acts, in that

(1) they had written to the agent directing him to return the deposit together with liquidated damages;

(2) they had continued the same broker in their employ and therefore were charged with the knowledge of what he did;

(3) they had employed the lawyer to execute the deed, therefore were charged with the knowledge of its contents.

This case was later reversed but the law laid down as to the ratification was not disturbed or questioned in the least, the reversal being based on purely equitable grounds.

So it is of no importance that complainants failed to sign the formal leases, having otherwise ratified the lease made by Borden.

Finally, it must not be overlooked that complainants retained all of Garfinkle's deposit for over two months, paid Borden his commission for rental, without objection then or later, and even after returning a check for $56.25 to Borden (not Garfinkle), retained and still retain $10.00 of the deposit made by Garfinkle. They even retained his check for $175.00 on account of rent without returning the same to him.

It is settled that repudiation must be of the whole contract and not only of part. It should be reasonably prompt. The principal cannot re-

tain the benefits of the contract and repudiate its burdens.

So in *Bodine* v. *Berg*, 82 N. J. L. 662, a bank accepted a note which contained alterations made by its general manager. The Court held that having accepted payments on account of that note, it could not disavow the manager's authority with respect to making alterations in the note. Thus the Court stated, at page 669, as follows:

> "By accepting and retaining the beneficial result of an unauthorized act of his agent, the principal, having knowledge of the facts, ratifies such act, and cannot repudiate the consequences of a particular act of the same agent in the identical transaction which produces the contract, the fruits of which are retained. * * *
>
> In the present case, it is undisputed that while the bank held the note, chargeable with knowledge of its alteration by its own officer, *it did not disavow the act* but accepted payments on account thereof, and also after its maturity, assigned the note, as altered, to the plaintiff who brings his suit on the note as changed. This amounts to a ratification by the bank of the act of its manager in altering the note when he accepted it for the bank, and therefore the alteration was not made by a stranger, but by the payee and holder at the time. We find no error in the conduct of the trial on this branch of the case."

> "Although a principal has an election either to repudiate or to ratify an unauthorized act of an agent on his behalf, he cannot, without the consent of the other party to the transaction, ratify in part or repudiate in part but must either repudiate

or ratify the whole transaction. He cannot ratify that part which is beneficial to himself and reject the remainder, but with the benefits he must take the burden; nor can he make the ratification conditional upon his suffering no loss."

(2 *Corpus Juris* 481, Sec. 99 citing, *Canadian* v. *Lea,* 74 Eq. 234, in which the Court said):

"If what was done and written between the parties is to be treated as a contract made by an agent on behalf of a principal, then I think the utmost right of the improvement company is to either accept the contract in its entirety and be obligated to carry it out; or, if it stands upon the ground that it did not know, at the time that it partially performed the contract, what the terms made by its agent were, and has not ratified the same, then its right is to repudiate the contract in its entirety and restore the other party to the position in which it was before any attempted change was made" (p. 247).

Applying the authorities to the case at bar, the obligation of complainants is established beyond peradventure.

Conclusion.

There never has been any disposition on the part of defendants to hamper or thwart complainants in the collection of whatever is due. The record shows that a tender was made even during the action, and refused by the complainants. (Exhibits D 19, p. 75; D 18, p. 74; D 17, p. 73.) Defendants' counterclaim has been fully established. The foreclosure action was

commenced by complainants because of an alleged default in payment of principal of $250.00 and of interest. (S. C. Bill of Complaint, p. 3, Paragraph 8.) The total sum then due was far less than $800.00 the sum due defendants on their counterclaim.

The decree should therefore be reversed and the bill of complaint dismissed, defendants granted judgment on their counterclaim together with costs and such counsel fee as to the Court may seem just and proper.

Respectfully submitted,

ROTHSCHILD & ROTHSCHILD,
Solicitors for Defendants-Appellants.

JAY LEO ROTHSCHILD,
Of Counsel and on the brief.

Court Press, N. Y. C. Bowling Green, 2820