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The first part of the report is devoted to a general
 description of the country, its position, extent,
 and the nature of its soil. It is situated in the
 north-western part of the State, and is bounded
 by the State of New York to the north, and by
 the State of Pennsylvania to the west. The soil
 is generally fertile, and is well adapted to the
 raising of grain and stock. The climate is
 temperate, and is well adapted to the raising
 of fruit and vegetables. The population is
 increasing, and is well adapted to the raising
 of grain and stock. The climate is temperate,
 and is well adapted to the raising of fruit
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 stock. The climate is temperate, and is well
 adapted to the raising of fruit and vegetables.

New Jersey Court of Errors and Appeals

Between

GEORGE SCHWEITZER AND REBECCA
SCHWEITZER,

Complainants,

vs.

NATIONAL HOUSE AND FARMS
ASSOCIATION, INC., a corpora-
tion of the State of New York,
Defendant.

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On Bill of
Complaint.

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Notice of Appeal.

(Filed Nov. 15, 1921.)

The complainants, George Schweitzer and Rebecca Schweitzer, hereby appeal from the order striking out bill of complaint made the 7th day of November, 1921, in the above stated cause and from the whole and every part thereof to the Court of Errors and Appeals as the last resort in all causes.

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TREACY & MILTON,
Sol'rs of Complainants,
George Schweitzer and
Rebecca Schweitzer.

Benjamin Treacy,
Of Counsel.

Dated November 12, 1921.

40

Petition of Appeal.

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

BENJAMIN TREACY,
Counsellor-at-Law.

Petition of Appeal.

(Filed Dec. 9, 1921.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

GEORGE SCHWEITZER AND REBECCA
SCHWEITZER,
Complainants-Appellants,

and

NATIONAL HOUSE AND FARMS
ASSOCIATION, INC., a corpora-
tion,
Defendant-Respondent.

On Bill of
Complaint.

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

The petition of George Schweitzer and Rebecca
Schweitzer, the appellants in the above stated
cause, respectfully shows that your petitioners
find themselves aggrieved by an order made in
the Court of Chancery by his Honor Edwin Robert
Walker, Chancellor of the State of New Jersey,
bearing date the 7th day of November, 1921,
wherein the said George Schweitzer and Rebecca
Schweitzer were complainants and the said Na-
tional House and Farms Association, Inc., was
defendant, in this respect, to wit:

Petition of Appeal.

That the said order orders that the complainants' bill of complaint be stricken out and the restraining order granted therein dissolved and that the complainants pay to said defendant his costs, to be taxed.

And your petitioners humbly appeal from the said final order and every part thereof, which orders as aforesaid, upon the ground that the same is erroneous for that the Court of Chancery, in striking out said bill of complaint, held that the matters set out in the bill of complaint did not create a case cognizable in equity; that the contract set out in the bill of complaint would not be specifically enforced because complainants had a complete remedy at law for damages; that rescission of the aforesaid contract would be refused; that rescission in the aforesaid contract would be refused because the mistake complained of was not mutual; that rescission of the aforesaid contract would be refused because no fraud is set out with certainty in the aforesaid bill of complaint but by mere allegations of a conclusion that the defendant was guilty of fraud; that the Court of Chancery has no power to make a new contract for the parties and to give damages to complainants for defendant's breach thereof; that there were no grounds for a reformation of the contract, that the restraining order theretofore granted would be dissolved.

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

TREACY & MILTON,
Solicitors of Appellants. 40

Benjamin Treacy,
Of Counsel with Appellants.

Answer to Petition of Appeal.

(Filed Jan. 25, 1922.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	Between GEORGE SCHWEITZER AND REBECCA SCHWEITZER, Complainants-Appellants, <i>and</i> NATIONAL HOUSE AND FARMS ASSOCIATION, INC., a corpora- tion, Defendant-Respondent.	} On Bill of Complaint.
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20 The answer of the above named respondent to the petition of appeal of the above named appellant.

30 This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that an order was, on the seventh day of November, 1921, 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, this respondent prays to refer there-
 40 to when the same shall be produced. And this respondent is advised and believes, that the said order is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

JOHN E. TOOLAN,
Solicitor for and of Counsel
with Defendant-Respondent.

Complaint.

IN CHANCERY OF NEW JERSEY.

(Filed Oct. 10, 1921.)

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

The complainants, George Schweitzer and Rebecca Schweitzer, of the Borough of Dunellen, in the Township of Piscataway, Middlesex County, New Jersey, respectfully show:

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1. That on or about November 28, 1919, they signed a contract for the purchase of a certain lot and parcel of land known as Plot No. 34 as laid down and shown on a certain map entitled, "Map of Model Farm Colony, etc.," a copy of which contract is annexed and made part hereof as though herein set out at length.

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2. The contract, among other things, provides that the purchase price is \$2,725.00; that \$350.00 is to be paid on the signing and execution of the agreement and that \$20.00 per month on account of the purchase price shall be paid from December 1st, 1919.

3. That early in November, 1919, they read an advertisement in the New York World which advertised for sale a house, an acre of ground and city water at Plainfield, N. J., for \$2,250.00—\$250.00 to be paid on the signing of contract and \$15.00 a month thereafter until the full sum was paid.

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4. On November 26, 1919, in answer to the aforesaid advertisement, they went to No. 9 Church Street, New York City, the office of the defendant company, where they met Mr. Benja-

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Complaint.

10 min Kline, President of the aforesaid company, and arranged to meet him in Plainfield on November 28th, to inspect the aforesaid property. On November 28th, the complainants met Mr. Kline at his Plainfield home and were driven to what they thought was the defendant's land at Plainfield.

20 5. That at the time of this inspection the housing conditions of the country were acute; that Benjamin Kline, representing the defendant company, stated to the complainants that he was sent from heaven to relieve the housing situation, or words to that effect; that he asked the complainants to have confidence in him that he would see that they had a suitable home; that the complainants at the request of the said Kline, did place confidence in him and trusted him to treat them fairly.

30 6. That the complainants are people of poor circumstances, and of little education: that prior hereto they had lived in New York City; never owned real estate and had transacted no business of any extent and never had occasion to employ a lawyer in any capacity; that the complainant, Rebecca Schweitzer, was born in Norway, coming to the United States about twelve years ago and has since learned to read and write English to a certain extent; that prior to signing the aforesaid contract, the complainants directed the defendant's attention to the purchase price, saying that it was too high and that it was more than the advertisement called for, whereupon, the defendant Kline pointed to a fire hydrant near the property in question thereby intending to convey the impression that the complainants were

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Complaint.

getting more than a house and lot; that they were settling in a first class community; that complainants afterwards discovered that although there was a fire hydrant there was no fire department and that the defendant Kline fraudulently concealed this fact and meant to conceal same; that at the time of this same inspection the defendant Kline also spoke about the modern civic conditions that obtained in the place in question; that the defendant company with Kline as its President, made these representations falsely and with intent to deceive well knowing that the place lacked a modern government and had none of the utilities of an average American city or town. That the premises in question are not located in a city or town in Plainfield or Dunellen, but in the Borough of Piscataway; that the defendant fraudulently asserted that the aforesaid premises were in Plainfield or Dunellen with the intention to deceive the buying public in that it is generally known that Plainfield and Dunellen are well governed towns with every modern utility, which fact would bring prospective purchasers to his development; that the Township of Piscataway has no fire department and is in no respect similar to Dunellen or Plainfield; that the premises in question and the surrounding territory do not enjoy a sewer system, gas and other utilities.

7. That complainants did not discover that there was no sewer or gas system and that their premises were not in Plainfield and not in Union County, until some time after they took possession of same.

8. That before signing the aforesaid contract and on the day of the aforesaid inspection it was

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Complaint.

10 agreed that the defendant company should erect for the complainants a bungalow similar to the one next door which was known as the Mosley bungalow; that it should contain a foundation exactly like the Mosley bungalow as the complainants intended to build a cellar thereunder at a later date; that the workmanship should be of the best and the materials new.

20 9. That the contract in question does not contain any of the conditions orally agreed upon, except that the purchase price is correctly set out, as well as the subsequent payments and the parties to the contract; that the defendant company fraudulently inserted in the contract that it would build a bungalow similar to the Mosley bungalow in that the bungalow in question was then being erected when the defendant company well knew that the erection of the Schweitzer bungalow had not been started. That the complainants signed the aforesaid contract in the office of the company at No. 9 Church Street, New York City, and were in the defendant's office not more than fifteen minutes at that time; that the defendant hurried the signing of the said contract, the complainant, George Schweitzer, not having more than two minutes for inspection at the time of signing, and
30 the complainant, Rebecca Schweitzer, less than that time; that while the complainant, Rebecca Schweitzer, was attempting to read the aforesaid contract, the said Kline took the contract from her and drew several lines in ink across the contract; that neither of the complainants saw the contract after this last mentioned act of Kline, but immediately signed same at the request of the defendant relying solely upon the good faith of
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Complaint.

the defendant as superinduced by the feigned honesty and kindly remarks of the said Kline.

10. That the aforesaid agreement also provides:

“SIXTH.—In consideration of the liberal terms of payment above granted it is agreed that the prompt payment is of the essence of this agreement, and if default be made in any of said payments, or if said purchaser shall violate any of the terms of said agreement, then, in that event, all right, title, interest, possession and claim of said purchaser, in and to the said premises, shall at the option of the company cease and terminate and all money theretofore paid shall be retained by the company as liquidated and fixed damages for the breach of this agreement. Non-enforcement on the part of the company of any of the purchaser’s payments on dates when due shall not constitute a waiver of its rights on this contract, unless said company’s waiver is in writing.”

11. That the complainants did not know that the said Sixth Clause was contained in the contract; that they did not know that they might pay on account of the purchase price all but their last installment, and failing in that payment, the defendant might keep all the moneys thus paid as well as eject them from their bungalow and lot; that they went to the defendant to buy a bungalow and lot and that the defendant fraudulently and intentionally and in neglect of its legal duty failed to apprise complainants of this condition of the contract; that the complainants did not know that the contract contained this clause, nor did they know its legal effect until they consulted their

Complaint.

attorneys in the spring of 1921, that they would not have signed the aforesaid contract had they known that the aforesaid clause was contained therein.

10 12. That the defendant has intentionally and fraudulently failed to build a bungalow of the proper material in a workmanlike manner in that the foundation is of paper and not concrete; that the plaster throughout the bungalow is cracked; the window-sills and doors are all out of plumb, so much in fact, that it is necessary to stuff rags around the windows to keep out the rain and the cold air; in that the roof leaks and the sky can be seen plainly through the holes which are innumerable; that due to its poor construction it is impossible to heat same in winter and is dangerous to the health of the complainants. Complainants are informed and believe that the defendant company erected the bungalow in this fashion knowing that the complainants were poor and unlikely to assert themselves and knowing that sooner or later it would have the house and bungalow as well as the complainants' money. That from the time they took possession of the aforesaid premises in March, 1920, they complained to the defendant company that it had not lived up to its contract and requested the defendant company to do so; that the defendant company repeatedly promised to do so, but never did. After these constant requests on the part of the complainants and failure of promise on the part of the defendant, complainants refused to make any further payments.

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40 13. That some time after the complainants stopped making payments, complainants, along with many of their neighbors, became suspicious

Complaint.

of the defendant company and in March, 1921, employed the firm of Treacy & Milton, to advise them; that they then discovered that their contract contained the "Sixth Clause" before mentioned; that said contract stated that their bungalow was being erected at the time they signed contract and that it failed to contain their oral agreement with the defendant company concerning the material to be used and workmanship employed. That from the beginning they relied upon the honesty and good faith of the defendant at the request of the defendant and being induced to do so by the supposedly kindly acts and manners of the defendant's agents.

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14. That the contract aforesaid is unconscionable and against public policy in that the poor and unsuspecting are led to believe that they are buying something, when in fact, they are not; in that through a stroke of misfortune a party to a contract such as this might be unable to meet one of the payments as it became due and might lose not only the right to subsequently acquire title, but also his hard earned savings already advanced by way of payment.

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15. That they were defrauded by the defendant when they were induced to sign this unconscionable contract which was drawn and executed by the defendant without the defendant explaining its material terms and without the complainants having the benefit of independent advice when the complainants were known to be ignorant of transactions such as this and in general not over endowed with intelligence.

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16. That they believe the lot and bungalow to be worth not more than \$1,000 and that they have seen the defendant company erect these bunga-

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Complaint.

lows in the course of three or four days with three men working. They are willing that the contract should be rescinded and that the moneys they have paid on account of the purchase price be returned to them by the defendant and that the defendant keep the bungalow and lot.

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Complainants are without adequate remedy at law, and, therefore, pray:

1. That the defendant company specifically perform its aforesaid contract; that a bungalow be erected after the plan of the Mosley bungalow in a workmanlike and inhabitable manner. That the dampness and wetness of the land be removed.

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2. That the contract aforesaid be rescinded as the same was entered into under a mistake of fact without independent advice and through the fraud and misrepresentation of the defendant and finally because it is by its terms unconscionable.

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3. That this Honorable Court reform the contract so as to provide for an equitable arrangement between the parties thereto with respect to the purchase price and title and that damages be paid to the complainants for the wrong and injuries they have suffered by reason of the defendant's breach of contract.

4. That a true value of the lot and bungalow be placed upon same and the defendants refund to the complainants a sum of money representing the difference between the real value thus determined and the contract price.

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5. That the said National House and Farms Association, Inc., which is the defendant in this suit, may answer this bill of complaint without

Contract Annexed to Complaint.

oath and each statement therein made.

6. That an injunction issue out of this Court to restrain the said National House and Farms Association, Inc., from proceeding at law against the said complainants.

That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises. 10

TREACY & MILTON,
Solicitors for Complainants.

Benjamin Treacy,
Of Counsel.

Contract, Annexed to Complaint.

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NATIONAL HOUSE AND FARMS ASSN., INC.
Incorporated under the Laws of State of New
York.

Main Office: No. 9 CHURCH STREET, New York
City.

AGREEMENT made the 28th day of November
in the year one thousand nine hundred and nine-
teen.

NATIONAL HOUSE AND FARMS ASSN., INC.,
a corporation organized and incorporated under
the Laws of the State of New York, hereinafter de-
scribed as the Company, party of the first part,
and GEORGE SCHWEITZER and REBECCA, his
wife, of 622 Greenwich St., N. Y City, hereinafter
described as the purchasers, parties of the second
part, in manner following: The Company in con-
sideration of the sum of TWENTY-SEVEN HUN-
DRED AND TWENTY-FIVE DOLLARS (\$2725.00), 30

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Contract Annexed to Complaint.

10 to be fully paid as hereinafter mentioned, hereby agrees to sell unto the said purchasers, ALL that certain plot, piece or parcel of land, situated, lying and being in the Township of Piscataway, County of Middlesex and State of New Jersey, known and designated as plot number THIRTY-FOUR (34) as
 20 laid out and shown on a certain map entitled "Map of MODEL FARM COLONY, situate in the Boro of Dunellen and Twp. of Piscataway, Middlesex Co., N. J., surveyed in Feby. 1919 by the F. A. Dunham-Clarín Co. Civil Engineers of Plainfield, N. J. and filed in the office of the clerk of Middlesex County, said plot being SEVENTY-FIVE feet front and FOUR HUNDRED AND FIVE feet in depth, said location and dimensions being shown on the back hereof TOGETHER with bungalow now being
 30 erected, similar to the one next door which the purchaser has inspected. To contain four rooms, sink and cold water connection.

AND THE SAID Purchasers hereby agree to purchase said premises at the said consideration of TWENTY-SEVEN HUNDRED TWENTY-FIVE DOLLARS (\$2725.00) with interest from date hereof at the rate of Six (6%) per cent. per annum, payable semi annually on the whole sum remaining
 30 from month to month unpaid, and to pay the principal sum as follows: THREE HUNDRED FIFTY DOLLARS (\$350.00) upon the signing and execution of this agreement, the receipt whereof is hereby acknowledged; and the balance TWENTY DOLLARS (\$20.00) upon the first day of December, 1919 and a like sum monthly thereafter until the
 40 said purchase price, interest and taxes shall have been paid, providing however that the said purchasers shall have the privilege of making larger payments and of paying off the entire amount.

Contract Annexed to Complaint.

AND IT IS MUTUALLY AGREED

FIRST: All sums of money payable hereunder shall be paid at the principal office of the Company in the City of New York and no other manner of payment is authorized.

SECOND: That there shall not be erected upon any portion of said premises any dwelling costing less than \$ and restricted to the usual nuisance clause. 10

THIRD: The company reserves the right to erect and maintain telephone and electric poles and wires over said premises, also water, gas and other pipes throughout the streets fronting on said premises, and to have the right to repair the same.

FOURTH: All taxes and assessments to become due and payable on said premises from the date hereof shall be paid by the purchaser. 20

~~FIFTH: For the purpose of beautifying said premises and to remove the wooded effect, the Company reserves the right to remove any and all trees which, in its judgment, it may be necessary to remove for the purpose of accomplishing a uniform appearance throughout the entire section.~~

SIXTH: In consideration of the liberal terms of payment above granted it is agreed that the prompt payment is of the essence of this agreement, and if default be made in any of said payments, or if said purchaser shall violate any of the terms of said agreement, then, in that event, all right, title, interest, possession and claim of said purchaser, in and to the said premises, shall at the option of the company cease and terminate and all money theretofore paid shall be retained by 30 40

Contract Annexed to Complaint.

the Company as liquidated and fixed damages for the breach of this agreement. Non-enforcement on the part of the Company of any of the purchaser's payments on dates when due shall not constitute a waiver of its rights on this contract, unless said Company's waiver is in writing.

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SEVENTH: Upon the payment of this agreement by said purchaser, the premises herein described shall be conveyed to said purchaser by good and sufficient deed of conveyance with covenants of warranty free and clear from all liens and encumbrances, and the Title of said premises is insured and guaranteed by the Title Company subject to the foregoing conditions which the said purchaser hereby agrees shall constitute conditions running with the land.

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EIGHTH: The deed aforesaid shall be delivered to the purchaser by the Company at its main office in the City of New York.

NINTH: All representations affecting this agreement are expressed herein, and no waiver or modification of this agreement shall be claimed or be of any force or effect unless reduced to writing and signed by the parties hereto.

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TENTH: It is mutually agreed between the respective parties hereto that this agreement shall not be assignable by the purchaser without the written consent of the Company.

ELEVENTH: And the purchaser hereby agrees to pay the sum of Five dollars per year for each plot for a term of five years from the date hereof to defray the expense for the overhauling and repairing of the streets for the said period.

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Contract Annexed to Complaint.

This agreement and all the terms and conditions thereof shall apply to and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties,

IN WITNESS WHEREOF, the said parties have caused these presents to be executed and delivered in duplicate the day and year first above written.

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NATIONAL HOUSE AND FARMS ASSN. INC.

(Seal)

By Benjamin J. KLINE, President.

SIGNED George Schweitzer (L. S.)

SIGNED Rebecca Schweitzer (L. S.)

Signed, Sealed and Delivered in
the presence of
Edward Melzer

(Back of Contract)

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New York, N. Y. November 28, 1919.

It is hereby mutually understood and agreed by and between the parties to the within agreement that the house mentioned therein shall be kept insured against loss by fire and storm at the expense of the Purchaser, with loss, if any payable to the Company as interest may appear.

NATIONAL HOUSE AND FARMS ASSN. INC.

By B. J. Kline

George Schweitzer (L. S.)

Rebecca Schweitzer (L. S.)

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**Affidavits of Complainants, Annexed to
Complaint.**

State of New Jersey, }
County of Hudson, } ss.:

George Schweitzer, of the above named complainants, being duly sworn according to law on his oath, deposes and says:

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1. That he has read the above bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters as are therein stated to be on information and belief, and as to those matters he believes them to be true.

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2. That on or about November 28, 1919, I with my wife, Rebecca Schweitzer, signed a contract for the purchase of a certain lot and parcel of land known as Plot #34 as laid down and shown on a certain map entitled "Map of Model Farm Colony, etc.," which contract is annexed to the bill of complaint. I and my wife read an advertisement of the defendant company in the New York World in the early part of November, 1919, which advertised for sale a good house, an acre of ground and city water at Plainfield, N. J., for \$2,250.00. I had always lived in the city and as the housing conditions were acute, I was tempted and did answer the aforesaid advertisement of the defendant company thinking their proposition might be a good one.

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3. I went to the office of the defendant company at #9 Church Street, New York City, and there met Mr. Benjamin Kline, President of the aforesaid company. I made arrangements with him to meet him at his residence #922 West Front Street, Plainfield, N. J., to inspect the property that

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Affidavit of George Schweitzer.

he had for sale. Carrying out this arrangement, my wife and I met Mr. Kline at Plainfield and were driven in his car to the premises in question. We were shown about the place and selected a lot and were shown a bungalow known as the "Mosely Bungalow," which was adjacent to our lot. We talked over the proposed purchase and it was agreed that the defendant would build a bungalow similar to the Mosely bungalow and that the same would be built of new material and erected in a first class and workmanlike manner. We particularly discussed the foundation to be built and insisted that our foundation should be of concrete like the Mosely bungalow because it was our intention to subsequently build a cellar under our bungalow.

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4. At the time of our going to the office of the defendant company as before set forth and on the occasion of the inspection of November 28, 1919, Mr. Kline asked us to place confidence in him and in his company, he stating that as the country was in the grip of an acute housing condition, it was a blessing to the complainants and people in like circumstances that he should have such a fair proposition to offer prospective purchasers at that time. Mr. Kline conducted himself kindly and in a manner which influenced me and my wife to place trust in him and his proposition and we were prepared to rely upon his obvious good faith.

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5. I understood that Plainfield and Dunellen were cities enjoying every modern utility and that they were well governed and a fine place to reside in. Because of this advertisement and because I had no knowledge that the premises were not located in either Plainfield or Dunellen, I naturally

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Affidavit of George Schweitzer.

10 concluded that we were locating in a place where there was sewer, gas, electric light and a well governed municipality. This was further brought home to my mind by the fraudulent act of the defendant company when, through its president, the aforesaid Kline, at the time of the aforesaid inspection when we complained about the price being approximately \$500.00 in excess of the advertised price, Kline alleged that we were moving into a neighborhood of fine homes and a more modern community well knowing that he was deceiving and misrepresenting the true situation to me and my wife.

20 6. On the occasion of the aforesaid inspection, Kline pointed to a fire hydrant which was nearby, fraudulently intending to convey to us that the city had ample fire protection and in general to have us believe that the city was well governed. I subsequently discovered that the fire plug meant nothing as there was no fire department and that our community was compelled to seek outside assistance in case of fire. I subsequently discovered that Kline had misrepresented about the kind of place we were moving into when I learned that there was no sewer, no gas, no fire department and well governed municipality, and further, that we were not located in either Plainfield or Dunellen 30 nor in Union County in which the two aforesaid cities are, but were situated in the Borough of Piscataway in Middlesex County, just over the Union County line, and that instead of residing in a well governed and modern community we were located in a place where there was no police or fire protection, no municipal government and not in such a place as Kline had represented it to be.

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Affidavit of George Schweitzer.

7. I signed the aforesaid contract after having the same in my hands less than two minutes. In fact, I was in the office less than fifteen minutes and during that time Kline was in a hurry to dispose of the signing of this contract. I had no reason to suspect this attitude of haste as displayed by the defendant company through its agents at that time because Kline had asked us to impose confidence in him and we had no reason to suspect that we were being defrauded. 10

8. I never owned real estate and never engaged in any business transactions, having been a poor working man and residing in the cities all my life. I did not employ a lawyer at the time this contract was signed, nor did the defendant suggest that I get one. In fact, I signed the aforesaid contract relying solely upon the honesty of the defendant as to what it contained. Not knowing what it contained and without reason to suspect the defendant company, I moved into the aforesaid premises in March, 1920, and found that in place of a bungalow similar to the Mosely bungalow, I had a poorly constructed shack, but due to the housing shortage and having no place to go, I remained there but not without having notified the defendant company that we were not satisfied with the place and that they had not complied with the contract. I repeatedly requested the defendant to build a proper place for us and the defendant continued to promise relief. 20 30

9. I still relied upon the good faith of the defendant and believed in the company until my repeated requests for relief were ignored to such an extent that I became suspicious and I thereupon refused to make any further payments until the 40

Affidavit of George Schweitzer.

defendant company had treated me as it had agreed. I subsequently learned that there was a general complaint in the community with respect to the defendant company and that I was not the only one that had been defrauded and cheated by it.

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10. I was asked if I would care to employ a lawyer to look into the situation and I agreed and was advised in March, 1921, that I had signed a contract, the contents of which I was not familiar with. I then discovered that the contract said that our bungalow was in the course of erection at the time the contract was signed, which was not the case and which was fraudulently inserted in said contract by the defendant as the ground for the bungalow had not been broken at the time the contract was signed. I further discovered that the contract contained the clause known as Clause Six, which I was informed meant that my wife and I had not purchased a house and lot, but that if we made all the payments set out in the said contract but one, and failing in that payment we would not only have no bungalow and lot, but would also lose the moneys we had heretofore paid to the defendant. I know that that provision was not discussed by us at the time of our oral agreement and so far as I know it was not in the contract. I believe that the defendant fraudulently concealed this fact from me and my wife not having explained it or spoken about it at any time knowing that if we knew of this condition we would not have signed the contract. I would not have signed the contract had I known that it contained such a provision. I went to the defendant to purchase a bungalow and lot and always thought that I was buying same and so informed the company, and if there were to be any conditions imposed upon

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Affidavit of George Schweitzer.

me, it was the duty of the defendant company to explain these conditions. The defendant company at all times fraudulently and with intent to deceive, failed to explain the aforesaid Clause Six and the rest of the clauses contained in the contract.

11. I believe that the defendant company did not intend to build a bungalow similar to the Mosely bungalow and that they knew that we would subsequently become dissatisfied with our bargain and refuse payment, whereupon, it, the defendant company, would take from us our bungalow and lot and keep the moneys which we had paid it in good faith. I and my wife have not a bungalow similar to the Mosely bungalow as the workmanship is of the poorest and the lumber is second hand, while the Mosely bungalow is well built and of new material. I believe that it will be impossible to live through another winter in the bungalow in question without our health being seriously and dangerously impaired. This belief is based upon the present condition of the bungalow which is fast going to the crumbling point.

12. I have no reason to impose any further confidence in the defendant company and I have every reason to be suspicious and to be convinced that I have been defrauded for I have paid insurance without having received a policy and without knowing in what company and in what amount I am insured. I have been asked to pay taxes on this property which the defendant company to its knowledge knew was not due and I have been sent bills for road grading and road improvements which the defendant company to its knowledge knew was fraudulent as the road upon which my bungalow abuts was a public road. As soon as I

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Affidavit of Rebecca Schweitzer.

discovered the fraud and misrepresentation of the defendant, I refused to pay my rent and as soon as I discovered that the contract contained clauses which I did not know existed, I employed counsel to get me the necessary relief and I have in no way delayed action upon discovering my legal rights.

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13. I am willing that the contract should be rescinded and that the bungalow and lot should be returned to the defendant and that the money I have expended in good faith on account of this contract should be returned to me.

GEORGE SCHWEITZER.

Sworn and subscribed to before me }
 this 8th day of October, 1921. }

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Helen Higgins,
 Notary Public,
 of New Jersey.

State of New Jersey, }
 County of Hudson, } ss.:

Rebecca Schweitzer, being duly sworn according to law, says:

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1. I am one of the complainants in the above entitled cause. I have read the bill of complaint and the allegations there set out are true of my own knowledge except as to those matters which are therein stated to be on information and belief, and as to those matters, I believe it to be true.

2. I accompanied my husband, George Schweitzer, on each and every occasion that he dealt with the defendant company as set out in the bill of complaint.

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3. I thought we were going to a well governed

Affidavit of Rebecca Schweitzer.

city where at least the convenience enjoyed by the average community would be ours. I thought that Plainfield was a modern city in every respect, and this induced me to a great extent to do business with the defendant.

4. I, with my husband, found after taking possession that we did not reside in Plainfield, and that we had been misled by the defendant because the community we went to live in had no fire department, no sewer system, no gas, and no active governing body. I am convinced that the defendant company through its agents made a point not to inform prospective purchasers that the Borough of Piscataway was the site of their prospective purchase and not Plainfield as advertised. I was never informed by the defendant company or its agents that we were purchasing a house and lot in the Borough of Piscataway and not in Plainfield, and I believe it was the legal duty and right of the defendant to inform us that we were not buying in Plainfield but in a poorly governed community. I recall distinctly at the time of our inspecting the premises on November 28, 1919, that we complained about the price asked and how it exceeds the advertised price, and how Kline, the defendant's agent spoke about the first class homes that were being built and the swell community in which we were to live and pointed with pride to a fire hydrant, that we might deduct that we would have splendid fire protection. I believe that this conduct was fraudulent on the part of Kline and his company because we have since discovered that while there is a fire hydrant there is no fire department. That instead of being surrounded by satisfied neighbors living in first class homes we are enveloped by a crowd of dis-

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Affidavit of Rebecca Schweitzer.

gruntled neighbors who complained that Kline has fraudulently violated his contract with them. That their homes are similar to ours and that they, like us, will remain in that community only with a serious chance of impairing their health.

10 5. I signed the aforesaid contract after having had the same in my hands less than two minutes. I had hurriedly scanned the said contract when Kline took it from me and crossed out one of the paragraphs. I do not know which paragraph he crossed out nor his reason for doing so, and I never had the contract returned to me.

20 6. While the contract was being signed we were at the defendant's office less than fifteen minutes and that there was an atmosphere of hurry prevalent.

30 7. I had no reason to be suspicious of defendant's acts at the time of the signing as my husband and I had placed our full confidence in it at the request of its agent Kline. I was impressed with the remark which Kline made about being sent from above to relieve the housing situation and that we were indeed fortunate to have such a person to come to our rescue in a time of trouble. I was further impressed with the kindly manners of Kline and had no reason to be suspicious.

40 8. I did not know that the contract contained clause six which provides that in default of making a payment the defendant may keep the money we have paid it as well as retaining the bungalow and lot. If I had known such a clause was in the contract, I would not have signed it. Further I thought I was buying a bungalow and lot from the defendant, and I believe it was the duty of the defendant to advise me and my husband that the contract contained such a drastic clause as

Affidavit of Rebecca Schweitzer.

the sixth clause of said contract. I did not know that the contract set out that our bungalow was being erected at the time the contract was signed. I did know, however, that such was not the fact. That our bungalow had not been started at the time of the signing of the contract. I thought that the contract contained clauses for the building of a bungalow for us similar to the Mosley bungalow of new material and in good workmanship, and I am surprised to learn that the contract does not contain these provisions as we thought and were led to believe that the written contract we signed covered the points which we talked about at the time we inspected the bungalow. I believe the aforesaid contract to be unconscionable for to my knowledge I have a dozen or more neighbors who were led into the same trap as we were, namely, they were induced by the undue influence of the defendant who first fraudulently gained their confidence to sign a contract of which they did not know the terms, which they signed without independent advice and which as ignorant people having had very little business dealings would be susceptible to defendant's wiles.

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9. I have been in this country about twelve years having come here from Norway where I was born. Since that time I have learned to read and write to a certain extent. My husband and I have always lived in the cities and have had no occasion to consider the purchase of real estate and had it not been for the housing shortage in the city we probably would have never left it.

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REBECCA SCHWEITZER.

Sworn and subscribed to before me this }
8th day of October, 1921.. }

Helen Higgins,
Notary Public,
Of New Jersey.

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Notice to Strike Out Bill of Complaint.

(Filed Oct. 17, 1921.)

In CHANCERY OF NEW JERSEY.

10	Between GEORGE SCHWEITZER and REBECCA SCHWEITZER, Complainants, and NATIONAL HOUSE AND FARMS ASSOCIATION, INC., a corpora- tion of the State of New York, Defendant.	}	On Bill of Complaint.
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20 To the above named Complainants and Messrs.
Treacy and Milton, their solicitors:

30 TAKE NOTICE, that on Monday, October 17th,
1921, at the hour of ten o'clock in the forenoon, I
shall move before the Chancellor in said Court of
Chancery Chambers, 75 Montgomery Street, Jersey
City, New Jersey, to strike out the amended bill of
complaint filed by the complainants in the above
cause and to dissolve, set aside and vacate the
order to show cause and the restraining order
granted on the bill and affidavits thereto annexed,
bearing date May 25th, 1921, on the following
grounds, to wit:

40 1. That the said bill fails to show any equity
in the said complainants entitling them to relief in
said court and fails to set up any facts and contains
no allegations to show that the complainants are
entitled to the relief prayed for in the said bill of
complaint.

Notice to Strike Out Bill of Complaint.

2. Because the said bill is multifarious in that the bill prays that the contract be specifically performed; that the said contract be rescinded; that the said contract be reformed as to provide for an equitable arrangement between the parties with respect thereto and that the true value of the lot or bungalow be placed upon the same; and that the defendant refund to the complainants the sum of money representing the difference between the real value thus determined and the contract price, thereby praying that the court fix the contract for the parties in this case and compel them to comply with terms to be made by the court and not by the parties, which the said court has no jurisdiction to decree. 10
3. Because the said bill is in other respects multifarious. 20
4. Because the said allegations of the bill of complaint do not support the prayer of the said bill or any part thereof.
5. Because the said bill prays that the said court make a contract for the parties without their consent.
6. Because the said bill contains no allegations entitling the complainant to specific performance. 30
7. Because the said bill contains no allegations entitling the complainant to rescind the contract.
8. Because the said bill contains no allegations entitling the complainant to reform the contract.
9. Because the said bill contains no allegations upon which the court can base a decree, fixing the true value of the said lot and bungalow and entitling the defendant to refund to complainants a 40

Notice to Strike Out Bill of Complaint.

sum of money representing the difference between the real value of the property and the contract price.

10 10. Because the said bill does not show that the complainants are entitled to an injunction or restraining order of the court.

11. Because the remedy of the complainants, if any, under the allegations of the said bill of complaint is by an action at law for damages.

12. Because the said bill fails to allege that the said complainants were in any way defrauded or misled.

20 13. Because the said bill alleges as the basis of the prayer that the complainants did not have the benefit of independent advice and relied upon the honesty of the defendant company and did not understand that they might pay all but the last instalment on account of the purchase price and because of negligence and failure to pay the said last instalment might lose their home (said property) and all the money they had paid to the defendant company, and did not understand the full purport of the instrument that they signed, but fails to contain any allegations showing that they were
30 defrauded or misled or that there was a misrepresentation on the part of the said defendant or its representatives or that there existed between the said complainants and the said defendant such relation of trust and confidence as entitled them to the benefit of independent advice, the said complainants having acted for themselves and being entirely *sui juris* according to the allegations of the said bill of complaint.

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Affidavit of Benjamin J. Kline.

14. And for such other decree as the said court shall deem wise and proper on the hearing of the said motion.

Yours, etc.,

JOHN E. TOOLAN,
Solicitor for National House and
Farms Association, Inc., Defendant. 10

Dated, Perth Amboy, N. J., October 11th, 1921.

Answering Affidavits.

In CHANCERY OF NEW JERSEY.

Between

GEORGE SCHWEITZER and REBECCA
SCHWEITZER,

Complainants,

and

NATIONAL HOUSE AND FARMS
ASSOCIATION, INC., a corpora-
tion of the State of New York,
Defendant.

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On Bill of
Complaint.

State of New Jersey, }
County of Middlesex, } ss. :

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Benjamin J. Kline, of full age, being duly sworn according to law, on his oath says:

I am President of the National House and Farms Association, Inc., a corporation under the laws of the State of New York, and I am the General Manager and Chief Executive Officer of that Company and have knowledge of its affairs and of the facts stated in this affidavit.

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Affidavit of Benjamin J. Kline.

I personally negotiated with George Schweitzer and Rebecca Schweitzer, his wife, the contract mentioned in their bill of complaint and affidavit in the above stated cause. Copy of that contract is hereto annexed and to which I respectfully refer as part of this affidavit. It was entered into by the
10 said complainants on November 28, 1919.

Some years ago the said defendant company purchased a tract of land in the Borough of Dunellen, in the Township of Piscataway, County of Middlesex and State of New Jersey, about a quarter of a mile from Plainfield City Line and caused the same to be divided into lots and parcels, caused streets to be laid out through the tract, had a map made by engineers and surveyors, which map was filed in the Office of the Clerk of Middlesex County and the tract was called Model Farm Colony. We
20 developed it, built houses and homes for people of moderate means and have sold off most of our plots and on many of them have erected houses of the character wanted by the purchasers. We have been dealing chiefly through contracts of sale like that made with Schweitzer and copy of which is hereto annexed.

A few days prior to the date of the contract, Mr. and Mrs. Schweitzer called at our office, No. 9
30 Church St., New York City, and saw Mr. Meltzer, Manager of the New York Office. Mr. Meltzer explained to them what we had and they expressed a desire to go out and see the property. A few days later they came out to the property themselves and I personally met them on the property. They inspected the different types of houses that we were building on the property and that had already been erected. I explained to them the
40 prices, terms of the contract and method of pay-

Affidavit of Benjamin J. Kline.

ment. They saw the plot of ground. It was then the latter part of November, 1919. They selected Lot No. 34 as the plot that they wanted to buy. The plot was 50 feet front and rear by 405 feet in depth and the price of the lot was \$2250 for the bungalow which was then nearly completed. They inspected the adjoining bungalow now occupied by Mr. Moseley and known as lot No. 33. They stated that it was just what they wanted. I showed them this bungalow, because they expressed a desire to see how the bungalow would look when it was all finished. They were there about half a day that day. They went over the whole property.

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I explained to them that the price of the lot and bungalow then nearly completed on lot No. 34 which they selected was \$2250 and they agreed to purchase it for that price on terms of \$250 down and payable \$15 a month. They agreed to sign a contract for that amount and to call at the office and execute the necessary papers.

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A few days later they called at the office, 9 Church Street, New York City, and saw me personally. They said they had decided that they wanted a little more land. Mr. Meltzer, Manager of the New York Office, was present. I asked them how much more they wanted. They said they would like about half as much again. I told them we could let them have 25 feet additional at the additional price of \$475 making the total plot with the bungalow, 75 feet front and rear by 405 feet deep at a price of \$2725 payable \$350 down and \$20 monthly. They said that was satisfactory. The contract was prepared and presented to them, copy of which is hereto annexed. They read over the contract and every part of it was explained to them. They objected to the fifth clause of the contract,

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Affidavit of Benjamin J. Kline.

Mr. Schweitzer objecting to it when it was read over and which reads as follows:

10 "Fifth.—For the purpose of beautifying the said premises and to remove the wooded effect, the company reserves the right to remove any and all trees which in its judgment it may be necessary to remove for the purpose of accomplishing a uniform appearance throughout the entire section."

20 Mr. Schweitzer said he did not want the trees cut down and at his request I erased that clause and placed my initials on the margin as shown. They paid \$350 down. The bungalow was completed a few days later and they moved into it when it was completed, and from that time down to January, 1921, they paid their regular instalments on the contract of \$20 a month and found no fault with anything. They got in arrears with their payments for January, February, March and April, 1921. We several times called their attention to their arrearages but they found no fault with anything and we did not undertake to forfeit their contract until April, 1921, when we served upon them a notice, copy of which is hereto annexed, signed by me as President of the company.

30 They took possession and occupied the property from sometime between December, 1919, and March, 1920 (the exact date I cannot state) down to the present time and are still in occupation of it. They never complained during all that time that the house was not built according to the terms of the contract, that there was any defect in the house. They never complained that the land was swampy or uninhabitable in any way. They never

40 gave any reason for stopping their payments on

Affidavit of Benjamin J. Kline.

the contract and since they stopped their payments commencing January, 1921, they have continued to live in the property and still live in it, never having vacated the same.

In April, 1921, I personally called on Mr. Schweitzer on the property to see him about the arrearages of payments. At that time he told me that they wanted to sell the property. That they were going to move out West on the farm that some near relative of theirs owned. His wife, Mrs. Schweitzer, was present, and he gave this as his reason for stopping the payments. He said he had engaged a lawyer and that that lawyer had advised him to stop the payments and he told him he would not be obliged to live up to the contract. At that time he made no complaint about the land being swampy or the house not being well built and he stated he had a buyer for the property and that if the foundation had been built the same as the foundation next door, meaning the Mosely bungalow, he would be able to sell his interest. It was very evident from his whole attitude and conversation that whoever was advising him had told him he could get out of the contract. We like to keep our purchasers satisfied and we make it a practice to comply with any reasonable demand in order that they may be satisfied.

We have erected altogether on that tract of land about 150 houses and I told him that his foundation was just exactly what he saw when he bought the property and in some respects was better than the foundation of the Mosely bungalow for that type of house, but I stated that I did not want him to forfeit his contract and that if he was dissatisfied, we would change the foundation and substitute a foundation similar to the one under the

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Affidavit of Benjamin J. Kline.

10 Mosely bungalow. He seemed to be well satisfied with that and arranged to call in the office to straighten out his payments within a couple of days. This was in April, 1921. Two or three times after that I saw him, but he never straightened out his payments. I would have changed the foundation if he had straightened out the pay-
ments, but I told him I would not do anything for a purchaser who was in arrears on his payments, because it was evident that someone was advising him and that he was simply using the matter of the foundation as an excuse to get out of his payments and continue to live in the property.

20 The house is well and substantially built for that price of house and exactly as mentioned in the contract. It is a good, workmanlike job for a house of that character. It would not pay this company selling houses and plots on the instalment plan as it does, over a period of years, not to build good, substantial dwellings and it is not true that the house is not built according to the contract.

30 I have been a real estate developer for twenty years and upwards and the house is well built for a house of that character and price. I have had years of experience in building houses of this character and we build good, substantial houses for our purchasers. If we did not do so, we could not do business and instead of making money would be obliged to go out of business.

40 We have on the tract a number of houses like this, sold to purchasers who are well satisfied, who are living in them and who are making their payments promptly and many of the houses have been sold for larger prices subsequent to this contract, than that paid by the Schweitzers. Following are

Affidavit of Benjamin J. Kline.

the names of the purchasers of some of the plots and houses, which we have sold, just exactly like the Schweitzer bungalow for prices more than the Schweitzers agreed to pay:

Mr. Pease for plot 50 x 280 feet, same character of house and land	\$2,750	10
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Mr. Glynn for plot 75 x 280 feet, same character of house and land	\$3,150	
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Mr. George plot 100 x 280, same character of house and land	\$3,550	
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I present herewith petition signed by over 65 property holders and purchasers and which I respectfully ask the Court to consider as to the methods in which we do business. The petition was prepared voluntarily by these people and not at my request in any way and is a protest against the scheme or plan gotten up by Schweitzer on the representation by someone, as I am informed, that he and those who have gone in with him, can escape making further payments on their contracts by court proceedings.

The statement in their affidavit that the lot is swampy is false and untrue. The land is not high, but the lot is not swampy. It is just exactly the plot that they selected when they saw it in November, 1919, and it is just exactly the plot that they moved on to when they moved to it in the winter of 1920, and after the bungalow was completed. They were entirely satisfied until as I am informed and believe some lawyer went to them and also went around among other people who were purchasing plots under contracts and told them he could get them out of these contracts and that they need not make any more payments and that for \$50 each he would look out for them. I did not hear the lawyer tell that and I make no accusations,

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Affidavit of Benjamin J. Kline.

but since this suit was started there has been among some of the purchasers of the properties on our plot of land a campaign instituted and about ten purchasers out of three hundred, have stopped making their payments and I have been informed they paid \$50 each to the attorney who told them not to make any more payments.

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As far as the signing of the contract with the Schweitzers was concerned, at the time they signed it, there was no lawyer present. I dealt with the Schweitzers personally. I explained the contract to them. Mr. Schweitzer read it over himself. I also explained to them that if they did not make their payments, it would be considered as a reasonable rent for the property during the time they occupied it. They both understood the situation thoroughly and were satisfied for over a year until somebody informed them that they did not have to make any more payments and could still occupy the bungalow and get out of their contract.

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It is not true that the foundation of their house was made of laths and paper. Schweitzer knows that is not true. The foundation of his house is on brick piers, enclosed between the piers with Bishop brick board often used in buildings of high type to enclose exterior walls, just according to what he saw. If his roof leaks it is because he has made holes in it and if the frame work or sash of his property is out of plumb or if the daylight is plainly visible through the cracks of the door, it is because he has injured the property himself for the purpose of getting out of his contract. He never complained to the company of any of these things.

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We never represented to him that the property

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Affidavit of Benjamin J. Kline.

was in Plainfield. He knew the property was in the Township of Piscataway, Middlesex County, New Jersey. It is so described in the contract and he knew the property was near Plainfield. He came there from Dunellen and he saw the exact location of it. I told him the property was near Plainfield, which is a quarter of a mile to the City line. 10

When he went out to inspect the property and before he signed the contract he actually discussed with me the question of taxes and we talked over the fact that it was an advantage to have the property in the Township instead of inside the City limits, because the Township taxes would only be about one fourth of what they would be within the City limits of Plainfield.

He has not paid the taxes for 1920, and there were no tax bills issued by the Township of Piscataway, that I know of, against either Schweitzer or anyone else for bungalows on properties that were not built. They agreed to pay taxes on the property, according to contract. 20

Schweitzer never requested me to clear up the swamp and remove the water, because there is no swamp there. It is not an unhealthy tract to live on, but is well located and I present photographs of the Schweitzer property showing how it is located on this tract. Also the Mosely property adjoining. 30

We do not want the Schweitzers to cancel their contract. We want them to live up to it and expect them to do so and we will not return the money, principal and interest after he has occupied the property for a year and five months and has damaged the property if it is in the condition that he says it is. 40

Affidavit of Benjamin J. Kline.

10 After repeated efforts to get Schweitzer to pay his arrearages and with knowledge that there was some lawyer about there stirring up these people by telling them that for \$50 each he could get them out of their contracts, we caused a notice to be served upon the Schweitzers and an action of ejectment started. The summons in that action was served the latter part of April. The Sheriff of Middlesex County went over there repeatedly to serve them and finally got service. Through their attorneys in reply to the action of ejectment they have filed the answer in which they state that they deny each and every allegation set up by the complainant in its case. Copy of the complaint in the ejectment suit is hereto annexed making part of this affidavit.

20 On May 10th, 1921, my attorney served upon Messrs. Treacy and Milton, their attorneys in the ejectment suit, a notice that pursuant to the statute in such case made and provided the plaintiff demands a bill of particulars of the claim or title of the defendants to the premises mentioned in the complaint and that they were required to serve such bill of particulars within twenty days of the date of such service. Service of that notice was acknowledged by Messrs. Treacy and Milton on
30 May 10th, but no bill of particulars has been forthcoming as to the claim of the Schweitzers.

No neighbors have been having trouble with our company except those who were stirred up by the Schweitzers or those representing them. As to the digging of a cellar under the bungalow in question, I never told them they could dig a cellar under the property. They never said anything about digging a cellar. There is no objection to making a cellar
40 under the property after they got a deed to it. They

Affidavit of Benjamin J. Kline.

will have to build up the foundation in order to do so, but that could be easily done if they care to go to the expense of making the necessary changes. We shall very seriously object and take proceedings to prevent them from digging a cellar under that property until they get title to it in fee, because we do not want people making alterations to our houses which they do not own and we will not permit it to be done. If the Schweitzers want to get out of their contract and surrender the same they can do so now, but we could not return their payments in view of the time they have occupied the property. Our houses and lots sell to satisfied purchasers and we do not sell to any persons, nor do we want any persons on our tract who are dissatisfied. We shall demand, however, that the contract that the Schweitzers made be lived up to and that if they move off of this property they forfeit the money that they have paid according to the terms of the contract and which will not be an unreasonable rent for the property during the time they have occupied it.

I absolutely deny that there was any fraud or misrepresentation in this matter at all and except for the interference of some outside person who has stirred these people up, I believe that the Schweitzers would have gone on and made their payments to the end perfectly content and satisfied. In pursuance of the scheme which I have referred to, there have been certain articles regarding this case in the Plainfield newspapers, the object of which apparently was to injure us in our sales and dissatisfy other purchasers. These articles I am informed and believe, are stirred up by these people who have been informed by somebody that they could get out of their contracts and are the

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Affidavit of Benjamin J. Kline.

result of a campaign instituted against us for the purpose of furthering their unlawful scheme and conspiracy.

10 These bungalows actually cost the Company \$1,400 to erect. It has four rooms. We buy our lumber and building materials at wholesale and pay spot cash for it and get the benefit of cash discounts. We employ most of our mechanics, tradesmen and laborers by the week and they are working for us all the time. They are good workmen. We pay them union wages and they are union men. We get the advantage, therefore, of wholesale prices and having the men work under our supervision and in charge of our own superintendent. If anyone undertook to build this bungalow standing by itself and purchased the material at
20 the time this material was purchased at retail and paid a contractor for the erection of it, it could not have been erected and put up for less than \$1,800 or \$1,900 when it was put up, so that the Schweitzers got the benefit of that in their contract and we got the benefit of it.

30 The land is a little over three-fourths of an acre, being 75 feet front and rear by 405 feet in depth. It has City water in the street, which we put in as part of the development. It has electric light in the street and the street has been graded and the property has been laid out at our expense which was great at the time this work was done on account of the high cost of labor and general conditions. We sell on easy payments and we pay cash for everything. There is no great or unreasonable profit in a sale like this. I devote all my time to the work. We have to maintain an office in New York City where we pay rent and an office force
40 of bookkeepers and accountants to take care of

Affidavit of Benjamin J. Kline.

the instalment payments and if after the expense we have been put to, we can't sell on the instalment plan a property like this for \$2,725 then we may as well go out of business, because we cannot make any money on our investment.

We could not sell this property for less even if we sold for cash and make a reasonable profit. The property is free and clear from all encumbrances. We have no mortgage on it. The Schweitzers are absolutely protected. They are at perfect liberty to file their contract if they wish to.

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In December, 1920, and before he stopped making his payments Mr. Schweitzer came to me and expressed a desire to purchase an additional lot 25 feet by 405 feet in depth, adjacent to his property on the West. I named him a price and prepared a contract by which he might purchase, but his wife wanted the strip for \$75 less than the price agreed upon between Mr. Schweitzer and myself and the matter was never carried out.

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About that time the said George Schweitzer and Rebecca Schweitzer, his wife, called upon me with Mr. John J. Kahn who lives on the tract and is purchasing a house and lot there, with a Committee appointed by the residents and property holders and asked me to contribute a plot of land for a Civic Association and a Fire House. I received the Committee courteously and after talking it over with them, I told them I would give them the tract that they wanted for that purpose. Mr. Schweitzer and all the members of the Committee were perfectly friendly in their attitude and neither George Schweitzer nor his wife made any complaint at that time about anything. Indeed I regarded them as people who apparently took a great interest in the Community for the purpose of

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Affidavit of Benjamin J. Kline.

promoting the general interests of that Community which has practically developed into a little town by itself.

10 I respectfully ask this Court that the restraining order heretofore granted be dissolved and the bill of complaint in this case dismissed to the end that the action of ejectment which we have brought against Schweitzer to recover possession of our property may proceed, unless they are willing to live up to the terms of their contract which they will do when they find that they cannot defeat us in the payment. They really want this property. They are satisfied with it. It makes them a desirable home. They have not changed their minds about it. They will live up to the terms of the contract if they find they cannot get the property for
20 nothing. They are people who would not have started this case and would not have got into arrears in their payments if they had not been told by somebody that they could get out of their contract.

BENJAMIN J. KLINE.

Sworn and subscribed before me
at New Brunswick, N. J., this
22nd day of June, 1921.

George R. Morrison.

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To

George Schweitzer and Rebecca Schweitzer,
Dunellen, New Jersey.

Sir & Madam:

40 Pursuant to the terms of a contract made by you with the undersigned, bearing date the 28th day of November, 1919, for the purchase of a plot of land at Dunellen and in the Township of Piscataway, Middlesex County, New Jersey, known as

Affidavit of Benjamin J. Kline.

Plot No. 34 on Map of Model Farm Colony, and upon which contract you have made default.

You are hereby notified that your rights in the said contract, and all your right, title, interest, possession and claim in and to the said premises has ceased and terminated and the said National House and Farms Association, Inc., does hereby exercise the option under the terms of said contract to declare the said contract ceased and terminated. 10

And you are further notified that all money hertofore paid by you is to be retained by the said National House and Farms Association, Inc., as liquidated and fixed damages for the breach of your said agreement.

And you are further notified and required to vacate the said premises and surrender possession thereof to the National House and Farms Association, Inc. 20

NATIONAL HOUSE AND FARMS ASSOCIATION, INC.,
L. S. By B. J. KLINE, President.

Dated, New York City, April 9th, 1921.

I personally served both Mr. & Mrs. Schweitzer with above notice, at their home located on premises described therein, on Saturday, April 9, 1921. 30

B. J. KLINE.

Affidavit of Edward Meltzer.

State of New York,)
 County of New York,) *ss.* :

Edward Meltzer, of full age, being duly sworn, according to law on his oath says:

10 I am Office Manager of the Main Office of the National House and Farms Association, Inc., of 9 Church Street, New York City. Some few days prior to the 28th day of November, 1919, it may have been two weeks prior, Mr. George Schweitzer and Rebecca Schweitzer, his wife, called at the office and stated they wanted to talk about the property of the Company in Middlesex County as they desired to purchase a little home. I explained to them what we had there and they expressed a desire to go out and see the property. I gave them
 20 directions as to how to go out to Dunellen and I notified Mr. Kline. A week or ten days later they met Mr. Kline in the office of the Company, 9 Church St., New York City, and from the conversation which they had I learned they had been out to the property in Piscataway Township, Middlesex County, New Jersey, and had inspected the lot, which was Plot No. 34 on Map of Model Farm Colony. When they called at the office it was November 28, 1919. They talked with Mr. Kline in my
 30 presence about the purchase of an additional 25 feet and terms were agreed upon that they were to have tract known as Plot No. 34, seventy-five feet front and rear by 405 feet in depth, fronting on Fourth Street. They said that this was the plot that they had seen, next to the bungalow on Plot No. 33 which has since been purchased by Mr. Moseley from one of our purchasers. The contract was drawn up in
 40 the office while Mr. and Mrs. Schweitzer were there.

Affidavit of Edward Meltzer.

Mr. Schweitzer took the contract and read it over himself. Mrs. Schweitzer also read it over. Mr. Kline explained it to them in my presence. The bungalow on the property was then being erected and was nearly completed. Mr. Schweitzer objected to the Fifth Clause of the contract which authorized the Company to remove trees when in its judgment it was necessary for the purpose of securing a uniform appearance of the lots. Mr. Kline erased that clause out of the contract and Mr. Kline signed the contract as president of the Company and George Schweitzer signed it and Rebecca Schweitzer signed it and I witnessed their signatures. My name is subscribed on the contract as witness. They paid \$350 cash down. They were entirely satisfied. They subsequently moved on to the property some time in the winter of 1920, after the bungalow was completed. I called upon them from time to time on the property. They were living in it. They never made any complaint. They were perfectly contented with the property and satisfied with their bargain. Sometimes they would make their payments of \$20 a month in the office. They paid it regularly without making any complaint until January, 1921, when they stopped making their payments.

In the month of April, 1921, after Mr. Kline had been out to see them about their arrearages I called upon them. Mr. Schweitzer then made no complaint about the property, but told me they wanted to sell it. His wife was present and he said that they were going out West. They had relatives out there who owned a farm and they wanted to go on the farm with these relatives. I told Schweitzer that there was no objection to his selling his contract if he could find anybody who

Affidavit of Edward Meltzer.

would buy it, providing the purchaser was satisfactory to the Company. He then made no complaint about the property of any kind. I told him I would try and find a purchaser to take over his contract and asked him to give me an authorization so to do in writing. I told him, however, that
 10 before that would be permitted his payments would have to be brought up to date. He refused to give me such an authorization and also refused to make his payments and told me that he had a lawyer who was going to get him out of his contract.

Schweitzer was always satisfied with his purchase until he got this notion that he could get out of the contract in some way. He has got about ten other persons in with him who have stopped making their payments. Except for these persons,
 20 every one of the property holders so far as I know is satisfied and the payments are being made regularly and promptly on the great majority of our contracts.

EDWARD MELTZER,
 A Foreign Commissioner.

Sworn and subscribed before me, a Notary Public duly commissioned, sworn and authorized by the laws of the State of New Jersey to take oaths and affidavits therein.

30 In witness whereof I have hereunto set my hand and seal this 23rd day of June, in the year One Thousand Nine Hundred and Twenty One.

ISABELLE ROSE,
 (Seal.) A Foreign Commissioner of Deeds,
 For New Jersey in New York.

Affidavit of Margaretha R. Headecky.

State of New Jersey, }
 County of Middlesex, } ss.:

Margaretha R. Hradecky, of full age, being duly sworn according to law, on her oath, says:

I reside at No. 53 West Fourth Street, on the tract of land owned and developed by National House and Farms Association, Inc., and known as Model Farm Colony, near Plainfield, N. J., and situate in the Township of Piscataway, Middlesex County, New Jersey. I bought plot known as Lot No. 53 in November, 1919, and negotiated the sale with Mr. Benjamin J. Kline, President of the Company. The plot is 75 feet front and rear by 405 feet in depth, and I agreed to pay for the same \$5,550, including the six-room, two-story frame house on the lot, with bath and improvements. I paid \$700 cash, \$100 additional on the signing of the agreement, making a total of \$800, and \$300 every six months, the first payment of \$300 having been made by me on May 1, 1920, and I paid \$300 every six months since then, the last payment having been made in May, 1921.

I am perfectly satisfied with the treatment I have received from the National House and Farms Association, Inc., and Mr. Benjamin J. Kline, President. They have done for me everything they said they would do. Mr. Kline and I had some disagreement, about repairs and there was some delay in making them, but Mr. Kline has now made the repairs according to my understanding of the agreement, and they have in every way treated me fairly. I have a satisfactory home, for which I am paying according to the terms of the contract, and I have found that Mr. Kline and the Company are willing to do everything they say they will do.

A few days prior to May 2, 1921, I was sent for

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Affidavit of Margaretha R. Headecky.

by a Mr. Dinkelo to go over to his house on May 2, 1921, in the evening. I went over there. Mr. Schweitzer was there, and ten or twelve other purchasers of property from the Company, also a man who said his name was Flanigan, and he said he was a lawyer, and had another man with him. This lawyer, Mr. Flanigan, said he could get Mr. Kline to fix the houses up and get him to do everything right, but he would have to have \$500, and we should pay him \$50 each. A few days later I gave to Mr. Dinkelo \$50, and he got a receipt for it, of which the following is a copy:

TREACY AND MILTON
Attorneys and Counsellors-at-Law
15 Exchange Place, Jersey City

John J. Treacy
John Milton
Benjamin Treacy

John L. Ridley
John G. Flanigan
Samuel Spingorn

May 2, 1921.

Received from Margaret Hradecky Fifty dollars (\$50.00), retainer in the suit of Hradecky *et al. v.* National House and Farms Association, Inc.

Signed, Treacy & Milton,
H.

I have not had any return for the \$50 that I paid, and I do not know that they have brought any suit. I did not want them to bring any suit.

Affidavit of Margaretha R. Headecky.

The idea of the conference seemed to be that we should pay the lawyer \$500, or ten of us pay \$50 each. Mr. Flanigan told me the night I was there not to make any more payments on my contract. He said to me and the others there gathered that he would try and get our properties cheaper and have everything fixed. I have not heard from him since. The whole object of the conference seemed to be that Mr. Flanigan was to get us all to buy our properties cheaper than set forth in the contracts. I saw Mr. Kline, and told him about it. I told him what I wanted done with regard to my house, and he did it. I did not want to go to any lawyer. I would not have gone to any lawyer unless I was sent for. I was only there a few minutes. I told Mr. Flanigan and the men who were there that Mr. Kline had promised to make the repairs. I paid him \$50, in the hope that Mr. Flanigan was going to succeed in getting our properties for us cheaper. Although I did not ask for my property any cheaper, of course, I am glad to save all the money I can. I was satisfied with my contract, and am satisfied with my contract now. After I paid the \$50, as herein stated, I made my \$300 semi-annual payment to Mr. Kline, according to my contract.

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I have not seen any of the parties since, and I do not know what has become of my \$50. How many other people paid Mr. Flanigan \$50, I do not know.

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MARGARETHA HRADECKY.

Sworn and subscribed before me at Dunellen, }

N. J., this 23rd day of June, 1921. }

Frank W. Smalley,

(Seal)

Notary Public.

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Affidavit of Cornelius J. McCarthy.

State of New Jersey, }
 County of Middlesex, } ss.:

Cornelius J. McCarthy, of full age, being duly sworn according to law on his oath, says:

10 I am one of the Constables of the Township of Piscataway, County of Middlesex, and State of New Jersey. I am also the chief police officer of said Township and one of the officers of the Board of Health of said Township. I know very well the real estate development of the National House and Farms Association, Inc., in the Township of Piscataway and the Borough of Dunellen, Middlesex County, N. J. Said development lies partly in the Township and partly in the Borough.

20 I have met George Schweitzer and Rebecca Schweitzer, his wife, on the said property. They are the complainants in this cause. I know the exact location of the lot where their bungalow is built. It is a desirable and well located spot for one of the cheaper class of plots and is not swampy land. It is perfectly habitable and desirable. They have on it a one-story bungalow which was built by the said National House and Farms Association, Inc. They have a chicken coop in the rear of bungalow and apparently a nice chicken yard. I never heard any complaint from them of any kind. There are houses built on land adjoining theirs on both sides. About 200 feet from them, on the opposite side of the road, there is a small pond. A few weeks, or possibly a few months ago the drain or outlet of this pond got stopped up. It is possible that some of the water overflowed on their land although I have my doubts about it as this drain particularly affects mostly the land adjoining it, which is the

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Affidavit of Cornelius J. McCarthy.

land of one Moseley and not Schweitzer's land. Since that time the drain has been cleared out by the National House and Farms Association, under the direction of B. J. Kline, its president, with whom I am very well acquainted; therefore, no one was harmed by it and I do not know if any of the water did overflow on the Schweitzer property. His property lies on the opposite side of the street. The pond has been there a great many years to my knowledge, was there when Schweitzer bought his property and was there when he first looked over his plot and has been there all of the time. Schweitzer's house and lot are as well located on the tract as scores of other plots which have been sold. It is not one of the best lots on the whole tract but appears to be better situated than some of the surrounding lots.

One of the purchasers on the tract, situated almost directly opposite the Schweitzer plot, wrote a letter a few months ago to the State Board of Health, apparently with a view of stirring up trouble in the neighborhood. As a result of this letter, I, as one of the officers of the Board of Health, went there to investigate matters. I called Mr. Kline's attention to the stoppage of this drain and also to the fact that some of the people there permitted the water from their sinks to run on top of the ground and thereby created a nuisance. Mr. Klein voluntarily agreed to clear out the drain, which he did. He also voluntarily built cesspools and did considerable grading at the expense of his company, which improved not alone the street but also the land around the bungalows, and as a consequence of the work which he did the Board of Health had no occasion to take action, as there was nothing for it to take action on. So far as I

Affidavit of Michael Welsh.

know Mr. Klein and his company are always ready and willing to co-operate with the officials of the Board of Health and have always done what could reasonably be expected of any real estate developer who takes great interest in the development of his property.

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CORNELIUS J. McCARTHY.

Sworn and subscribed to before me }
 this 24th day of June, 1921. }

Jeremiah F. Ten Eyck,

(Seal)

Justice of Peace.

State of New Jersey, }
 County of Middlesex. } ss.:

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Michael Welsh, of full age, being sworn according to law on his oath says:

I am well acquainted with Benjamin J. Kline, President of the National House and Farms Association, Inc. I have been employed for several years last past as Foreman of the Development which they are making near Plainfield and situate in the Borough of Dunellen, Township of Piscataway, Middlesex County, N. J., and which is known as Model Farms Colony.

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I am very familiar with that whole property and have been Foreman of the grading of the streets, putting in of the water mains and leveling and grading of the property generally.

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I know the Schweitzer property on Fourth Street. The property is not swampy or wet. It is well located. There are a number of houses on that street of the general character of the Schweitzer house. I am well acquainted with George Schweitzer. I never heard him nor any of the residents on that street complain of the property being swampy, low or wet. It is not one of the best

Affidavit of Michael Welsh.

lots on the whole development. Neither is it one of the highest priced lots, but it is well located and the bungalow is a well built, comfortable four-room bungalow taking into consideration the price that was paid for the said bungalow and lot.

There is a small pond diagonally opposite the Schweitzer property and the drain to that pond got stopped up some months ago. I had charge of the opening of the drain. I do not believe that the overflow water reached the Schweitzer property. I did not see any dampness on the Schweitzer property. Since I have been employed by the Company it has spent over \$20,000 under my supervision in grading and opening streets. I have talked with many of the buyers of properties there to whom the Company has sold or is selling lots and for whom it has erected houses. They are practically unanimous in their expressions of satisfaction and of the fair treatment that has been accorded to them by Mr. Kline and the Company.

The Company endeavors to satisfy them in all matters.

I have had charge of the cement and concrete work done by the Company and the concreting of cellars to the houses, which have cellars underneath them. I have known of a number of cases where the Company put concrete bottoms in the cellars for purchasers over a year after they had accepted the properties and occupied them although not called for by their contracts and although there was no concrete in the properties when they were purchased and accepted by the purchasers.

I never heard either Mr. or Mrs. Schweitzer make any complaint of any kind about their house, although they know me and know I am Foreman.

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Affidavit of John Kahn.

They have lived there considerably over a year to my personal knowledge and have not given in that time any expression of dissatisfaction to me.

M. WALSH.

10 Sworn and subscribed before }
me at Dunellen, N. J., this }
24th day of June, 1921. }

(Seal) Frank W. Smalley,
Notary Public.

State of New Jersey, } ss.:
County of Middlesex. }

John Kahn, of full age, being duly sworn according to law on his oath says:

20 I live on the tract of land known as Model Farm Colony, situate in the Borough of Dunellen, Township of Piscataway, County of Middlesex, New Jersey. I am buying my house under contract with National House and Farms Association, Inc. I am well acquainted with Mr. Benjamin J. Kline.

There are on the tract so far about 150 houses which have been erected by the Company under the supervision of Mr. Kline as President since he originally bought the tract and started to develop it.

30 I know George Schweitzer and Rebecca Schweitzer, his wife, who are the complainants in this cause. I know their house and lot. It is not so well located as some of the more expensive houses and lots. The ground is not as high. It is not as well located as my house which is on the street known as Pine Avenue, but the house is not on swampy ground. I know the small pond which
40 lies diagonally across the lot from the Schweitzer property and I know the outlet to it which is

Affidavit of John Kahn.

nearer to Mr. Moseley's property than to the Schweitzer property.

I have found that the company and Mr. Benjamin Kline did everything they said they would do and even more. I am satisfied and most of the buyers there are satisfied. I never heard any complaint on the part of the Schweitzers. After the Schweitzers had lived there for a year they were on a committee with me appointed by the residents and purchasers of plots and houses on the tract to call upon Mr. Kline and ask him to donate a plot of ground for a fire house and a civic association. This was in December, 1920, over a year after the Schweitzers had bought their house and when they had been living there about a year. They never made any complaint at all at that time. We called upon Mr. Kline and told him what we wanted. I am the Vice-President of the Civic Association and of the Fire Department. The Schweitzers were with me. We laid the matter before Mr. Kline and he consented and agreed to give us the land for a Civic Association and Fire House. The properties are well built. I never knew anything about and was not consulted about any plan to enable the property holders to get their houses from the Company for less money than they had agreed to pay for them. I do not know that I would have gone into any such scheme if it had been laid before me. I was not asked to contribute \$50 in order that I might get out of my contract. I was not consulted about the matter at all.

Mr. Kline takes a great interest in the property holders in the neighborhood. He is constantly on the ground, supervising the erection of the buildings, care of the streets, and take it all in all, the

Affidavit of Charles Bicknell.

property is an excellent development. The great majority of the purchasers there are satisfied and pleased.

JOHN J. KAHN.

10 Sworn and subscribed before }
me at Dunellen, N. J., this }
23rd day of June, 1921. }
Frank W. Smalley,
(Seal) Notary Public.

State of New Jersey, }
County of Middlesex, } ss.:

Charles Bicknell, of full age, being duly sworn according to law on his oath says:

20 I am a carpenter and builder. I have been employed by the National House and Farms Association, Inc., of which Mr. Benjamin J. Kline is President, for the erection of a number of houses on the tract which it is developing about one-quarter of a mile from the City Line of Plainfield, in the Township of Piscataway, and Borough of Dunellen, known as Model Farms Colony. I am familiar with the Schweitzer house on Fourth Street. I was working on this house when it was erected. I supervised the carpenter work in the erection of this house. The lumber and building materials were obtained from the Loizeaux Lumber Company in Plainfield. The house is well erected. It is a four-room bungalow erected on brick piers with Bishop brick board such as is customary to use for outside enclosures. It is a material that is used largely by builders where the exterior is stucco and plaster and is rather more expensive than ordinary concrete foundations such as has been used on the bungalow now oc-

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Affidavit of Charles Bicknell.

cupied by Moseley adjoining the Schweitzer property on the east.

I remember when George Schweitzer and his wife came there to look at the house one day with Mr. Klein in late fall of 1919 or early winter of 1919. They then saw the property which was nearly completed and upon which I was working. They went all through it. The foundation had not then been enclosed so they saw it was erected on brick piers. They wanted a door cut through from one room to another and I was called in by Mr. Kline for the purpose of estimating the cost of cutting that door through. It was decided not to have the door cut through and Mr. Schweitzer was told right there in my presence by Mr. Kline that they would not have the door cut through because it would change the plans of the house, but that if Mr. Schweitzer cared to have the door cut through he was at liberty to do so at his expense. So far as I know the door was not cut through. Afterwards I understood that Mr. Schweitzer bought the property on a contract.

The house does not leak, or it did not leak when it was finished, and there is no reason why it should leak now, unless it was damaged. It was well and carefully built for a house of that class—as well built as any house of that class is built. The woodwork was well put in, and the doors and windows and frames carefully and skilfully put in by competent mechanics under my personal supervision. If the weather beats through any of the doors and windows now, I have no hesitancy in saying that it occurs because the property has been damaged. I have never heard any complaint from anybody on the property that the buildings were not well constructed as a general proposi-

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Affidavit of Charles Bicknell.

tion. Sometimes Mr. Kline will come to me and inform me that this purchaser or that purchaser wants some repairs made, and directs me to see that it is done, and it is promptly done. It is his effort to satisfy purchasers every way that he can and comply with all their reasonable demands.

10 Indeed, I have known him to do things for them that were not reasonable because he wanted to keep them satisfied and because there is a happy and contented community there, which has been built up through his efforts, and practically all the people are friends of Mr. Kline, and speak of him in the highest terms. I have talked with the Schweitzers repeatedly since they have been there. I have been on the tract practically every day for the last two or three years, most of the time working on it. The Schweitzers never made any complaint to me of any kind, directly or indirectly, although they knew I was one of the superintending mechanics, and although they knew that their bungalow had been erected under my personal supervision.

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I have been a carpenter and builder for at least twenty years, and have built many houses under contract; some for myself. I am familiar with the price of materials and labor, and have been for the last twenty years. I was familiar with the price of material and labor all the time this property was built. If the Schweitzer bungalow were to be built singly as it stands in the fall of 1919 and winter of 1920, when it was built, and the building materials used in it had been purchased at retail for that one building, and contracted for by a contractor, it could not have been erected for less than \$1,800, although I understand it was erected by the company for about \$1,400, Mr. Kline

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Affidavit of Ernest H. Moseley.

buying his material at special cash discounts and in large quantities, employing his labor and paying for it himself, without any contractor's profit.

CHARLES BICKNELL.

Sworn and subscribed before }
 me at Dunellen, N. J., this } 10
 23rd day of June, 1921. }
 Frank W. Smalley,
 (Seal) Notary Public.

State of New Jersey, }
 County of Middlesex, } ss.:

Ernest H. Moseley, of full age, being duly sworn according to law on his oath, says:

I reside on the tract of the National House and Farms Association, Inc., and known as Model Farm Colony, situate in the Borough of Dunellen, Township of Piscataway, Middlesex County, N. J. I am the owner of house and lot No. 33. I have been a surveyor for 65 years, and during that time was employed as City Surveyor in Brooklyn with the Meserole Surveying Company. My house and lot is next to the house and lot occupied by George Schweitzer and Rebecca Schweitzer, his wife, the complainants in this cause. I am well acquainted with the Schweitzers, and am familiar with the lay of the land, having in my career as a surveyor surveyed many lots and tracts. 20 30

My house is the one which is referred to as the Moseley Bungalow. I am familiar with the building. I know the Schweitzer property. Their house appears to be a better building than mine. It appears to be more carefully and better constructed. It has no cellar under it, and mine has no cellar under it. Their house is built on brick piers, and 40

Affidavit of Ernest H. Moseley.

the foundation is not composed of paper and laths, because the brick piers upon which it is constructed constitute its foundation and its piers. Between the piers it is enclosed with Bishop brick board.

10 My house is a little lower than their house, and a little nearer to the drain constituting the outlet to the small pond on the opposite side of the road, and which pond has been there ever since I knew the property, and has doubtless been there from time immemorial. The outlet to the pond got closed up a few months ago, and the water overflowed a little, making my lot damp. After complaint by the neighbors, the National House and Farms Association, Inc., caused the drain to be cleared out, under the direction of Mr. Kline.

20 We lived in our house, which was nearer to the pond, all the time. I lived there with my wife and my family. We did not suffer from dampness although my house is lower than the Schweitzer property. Neither lot was swampy. The Schweitzers have erected in the rear of the bungalow a good sized chicken yard, where they keep chickens and their chickens seem to be healthy. I see the Schweitzers going out to their chicken yard caring for the chickens. I have never heard them make

30 any complaint.

I took my house by assignment of a contract by a purchaser from the company and I am paying for it and I am satisfied with it. We have a nice little home there. I find that the company is ready to perform all they ever agreed to do and more and Mr. B. J. Kline takes a deep interest in the tract which he is developing, and has spent a great deal of time on it. He has erected over

40 150 houses on it since he started to develop it

Affidavit of Ernest H. Moseley.

and people who are buying are occupying most of these houses. The community is a pleasant one and I hear no general fault-finding or complaint. Indeed, the great majority of the purchasers are satisfied and contented and even pleased with their purchases as I am.

The Schweitzers lived on the place since I have lived there about one year and I was surprised when I heard that they were finding fault. Nobody came to me and told me I could get my house and lot for less money than I had agreed to pay for it. I do not know that I would have gone into a plan to do so if they had. I was not asked to join in any such scheme or contribute towards the fees of attorneys who were to obtain for the purchasers the properties at less money than they had agreed to pay.

Since I have been there I have purchased an additional tract of 75 feet by 400 feet adjoining my plot to the east of my bungalow and for which I am paying off on the instalment plan with my bungalow property.

ERNEST H. MOSLEY.

Sworn and subscribed before
me at Dunellen, this 24th
day of June, 1921.

Frank W. Smalley,
Notary Public.

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Decree Striking Out Bill of Complaint.

(Filed Nov. 7, 1921.)

IN CHANCERY OF NEW JERSEY.

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Between
 GEORGE SCHWEITZER and REBECCA
 SCHWEITZER,

Complainants,

and

NATIONAL HOUSE AND FARMS AS-
 SOCIATION, INC., a corporation
 of the State of New York,
 Defendant.

On Bill of
 Complaint.

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This cause coming on to be heard in the pres-
 ence of Treacy & Milton, of counsel with the com-
 plainants, and John E. Toolan, of counsel with the
 defendant, upon motion to strike out the bill of
 complaint filed herein, and the argument of coun-
 sel having been heard, and the Chancellor being
 of the opinion that there is good and sufficient
 reason therefor,

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It is on this seventh day of November, ordered,
 that the bill of complaint be, and the same hereby
 is stricken out, and the restraining order granted
 thereon dissolved, and that the complainant pay
 to said defendant his cost on this motion to be
 taxed.

EDWIN ROBERT WALKER.

Respectfully advised,

JOHN GRIFFIN, V. C.

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Memorandum.

lar to the one next door, which the purchaser has inspected; to contain four rooms, sink and cold water connections" for the sum of \$2,725; and upon payment of the purchase price a deed was to be delivered.

10 By the Sixth Clause of the contract it is provided that if the complainants fail to make prompt payments, or if they shall violate any of the terms of the agreement, the right, title and interest of the purchaser in the premises shall, at the option of the defendant, cease and terminate, and all moneys theretofore paid shall be retained by the defendant company as liquidated and fixed damages for the breach of this contract.

20 It appears that on November 26th, 1919, in answer to an advertisement appearing in a New York paper, the complainants went to the office of the defendant, and on November 28th made an inspection of the premises. The bill sets out that the housing conditions in the country at that time were very acute, and that Mr. Kline, the president of the defendant company, asked the complainants to have confidence in him, and that they did confide in and trust him; that they are poor people, with little education, and without knowledge of real estate transactions; that on the inspection
30 the complainants complained of the price. "Whereupon the defendant, Kline, pointed to a fire hydrant near the property in question, thereby intending to convey the impression that the complainants were getting more than a house and lot, and that they were settling in a first-class community." And complainants aver that afterwards they discovered that although there was a fire hydrant there was no fire department, etc.; and that
40 Kline fraudulently concealed the fact; and that

Memorandum.

he also spoke about the modern civic conditions that obtained at the place in question; and that Kline, as president, made these representations falsely, with intent to deceive, well knowing that the place lacked a modern government, and had none of the utilities of an average American city or town; and that the premises were located, not in Plainfield or Dunellen, but in the Borough of Piscataway, and that defendant fraudulently asserted that they were in Plainfield or Dunellen, with the intention to deceive the buying public, etc., and that complainants did not discover that there were no sewer or gas systems, and that the premises were not in Plainfield, until after they took possession of the same.

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By the Eighth Paragraph of the bill complainants aver that at the time of the inspection and the signing of the contract for the premises it was agreed that the defendant company should erect for the complainants a bungalow similar to the one next door, which was known as the "Mosley Bungalow"; that it should contain a foundation exactly like the Mosley Bungalow, as the complainants intended to build a cellar thereunder at a later date; that the workmanship should be of the best and the materials new, and the averment is that the said bungalow was not thereafter built in accordance with these provisions, and that after the inspection, and on the 28th day of November, 1919, the complainants signed the contract in less than two minutes, and while the complainant, Rebecca, was attempting to read the contract Kline took the contract from her and drew several lines in ink across the contract; that neither of the complainants saw the contract after

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Memorandum.

this last-mentioned act of Kline, but immediately signed the same, relying solely on the good faith and remarks of Kline.

10 The Tenth Paragraph of the bill sets out the Sixth Clause of the agreement as to forfeiture of any payments made under the contract in case of default; and alleges that complainants did not know that this clause was contained therein, and did not know of this default clause until the spring of 1921, when they consulted attorneys; and that if they had known of this clause they would not have signed.

20 The Twelfth Clause sets out the failure of the defendant to build the bungalow in the manner provided in the agreement; and that since March, 1920, when they took possession of the premises, they had requested the defendant to put the bungalow in shape, and that defendant promised to do so, but failed.

The Thirteenth Paragraph alleges that after the complainants stopped making payments, they discovered that their contract contained the said Sixth Clause.

30 The prayer of the bill is that the defendant specifically perform its contract; that the bungalow be erected after the plan of the Mosley Bungalow; that the contract be rescinded; that the contract be reformed; that the true value of the lot and bungalow be ascertained, and that defendant refund to the complainant the difference.

40 As to the prayer that the defendant specifically perform the contract by the erection of a bungalow like that of Mosley, the agreement in the contract for this building was subsequent, and the failure of the defendant to perform its building agreement gives the complainants their action at

Memorandum.

law. In addition to this, I am not aware of the fact that a court of equity will decree the specific performance of works of this character.

As to the representation that the property was in Plainfield or Dunellen, the contract plainly specifies that it is in Piscataway, and the bill alleges that the complainants learned this fact some time after they took possession of the same, which was in March, 1920, and the bill was filed about a year later.

10

All the allegations of fraud and misrepresentation are vague and indefinite; the particular fraud and misrepresentation are not specified, and the general charge of fraud is not sufficient. *Small v. Boudinot*, 9 N. J. Eq., 381 (391); *Woglom v. Kant*, 69 N. J. Eq., 489 (495).

I think it is apparent from a reading of the bill that the objection of the complainants is addressed almost solely to the failure of the defendant to build a bungalow in accordance with the terms of the contract; and all the other allegations of the bill are mere embellishments.

20

A decree will be advised dismissing the bill.

30

[7529]

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New Jersey Court of Errors and Appeals.

Between

GEORGE SCHWEITZER and REBECCA

SCHWEITZER,

Complainants-Appellants,

and

NATIONAL HOUSE AND FARMS AS-

SOCIATION, INC., a corporation,

Defendant-Respondent.

On Appeal
from
Court of
Chancery.

BRIEF FOR COMPLAINANTS- APPELLANTS.

Statement of the Case.

This is an appeal from a decree in Chancery advised by Vice-Chancellor Griffin. The decree appealed from is found printed on page 64 of the State of the Case. The opinion of Vice-Chancellor Griffin is printed on pages 65-69.

The question presented is whether or not the Bill of Complaint sets out a cause of action. The respondent directed a motion to the complaint praying that it be dismissed. The notice to strike out Bill of Complaint is printed at page 28 and the Bill of Complaint at page 5 of the State of the Case. From the decree dismissing the Bill of Complaint, appellants seek relief.

Facts.

On November 28th, 1919 George Schweitzer and Rebecca Schweitzer, his wife signed a contract to purchase a parcel of land from the defendant, the National House and Farms Association, a corporation of the State of New York. In the same contract, the said defendant agreed to erect a bungalow for the complainants similar to a bungalow owned by one Mosely which was located nearby and which the complainants inspected.

A few days previous thereto, the respective parties aforesaid discussed at length the various terms of the contract and the complainants believed that when they signed this contract that it contained the oral agreement, and that the signing of the written contract was a mere formality. The purchase price was \$2,725, \$350 of which was paid on the signing of the agreement and \$20 was to be paid each month on account of the purchase price until the full amount had been paid. The oral agreement, the complainants contend was an agreement to purchase property, and it was their understanding that as they paid moneys on account of the purchase price they acquired so much title from the defendant. The complainants also understood that their lot and bungalow were located in Plainfield as they were induced to do business with the defendant by an advertisement in the New York World which advertised houses and lots for sale at Plainfield-Dunellen, N. J.

The complainants have always lived in New York City from the time they emigrated from Europe, were people of very little means, more or less ignorant and had never owned real estate, and had it not been for the housing situation which at that time was acute and had it not been for the importuning of the defendant's agents, the com-

plainants undoubtedly would have continued to occupy a small flat in the City of New York.

The defendant, principally through its agent and President, Benjamin Kline, induced the complainants to purchase the property aforesaid stating at the time of the oral agreement that it was a blessing that he had been sent to relieve the housing situation and asked complainants to repose confidence in him and his company. Thus the complainants impressed by the good faith and honesty of Kline and his Company made this oral agreement and when the same was reduced to writing were not, and had no reason to be suspicious of defendant. They thought that the written contract contained their oral agreement, and so at the time the contract was signed, the fact that the execution of same was hurriedly completed and the fact that they merely scanned the contract before signing did not impress them.

The complainants took possession of the premises in question some time in March, 1920, and at the outset notified the defendant that their bungalow was not built similar to the Mosely bungalow, that their bungalow was built of second-hand material and the workmanship was not up to the ordinary standard. They continued these protests intermittently from that time, and the defendant promised to rectify its mistakes. These promises, however, were idle, and after several payments had been made on account of the purchase price, and in November, 1920, complainants refused to make further payments until the defendant would live up to its contract. The defendant would not make any repairs or attempt to comply with the terms of its contract, and in March, 1921, complainants had occasion to discuss their plight with their neighbors who likewise had contracted with the defendant and

thereupon discovered that these neighbors were being treated in the same fashion. There was a general and sudden suspicion of defendant and it was determined that advice should be sought from attorneys whereupon, in March, 1921, the complainants with their neighbors employed Treacy & Milton, Attorneys and Counsellors at Law with offices in Jersey City. The complainants were advised and discovered for the first time that their contract contained clause "6" and then realized that the aforesaid sixth clause had been inserted in the contract without their knowledge or consent. As before narrated, the complainants understood they were purchasing a piece of property and as they made payments, they *ipso facto* acquired so much title and did not at any time understand that the moneys so paid would be forfeited as liquidated damages, if any one of these installment payments, be it the last should not be made.

They for the first time discovered that the written contract did not contain the oral agreement and thereupon instructed their attorneys to proceed legally in their behalf. While the pleadings were being prepared, and before the same were filed, the defendant caused a complaint in ejectment to be served upon complainants, and it is to be noted that the sole ground for relief as alleged in the complaint in ejectment was based upon the sixth clause of the contract aforesaid.

The complaint in ejectment was filed in April, 1921, and before the time for answer had expired the complainant caused a bill in Chancery to be filed and an injunction issued restraining the defendant from proceeding with its action in ejectment. The defendant served notice upon the complainants of a motion to strike out the bill of complaint and after much delay and many appear-

ances in court during which time an amended bill of complaint was filed by the complainants, Vice-Chancellor Griffin finally, on November 7th, 1921, advised an order striking out the bill of complaint and dissolving the restraining order. Notice of appeal was thereupon filed and an order was made staying the action in ejectment until the determination of the appeal by the Court of Errors and Appeals.

It should be noted that a bond as required by Chancery Rule 206 was filed by the complainants at the time they originally secured an order restraining the action in ejectment and further that an additional bond was filed by the complainants, the defendants in ejectment at the time the stay pending appeal was granted. It should be further noted that the question of laches and multifariousness were disposed of before the final argument, and that no reference to laches and multifariousness appears in the memorandum filed by the Honorable Vice-Chancellor. Again the complainants were not put to an election, and the sole question has been whether or not the bill of complaint upon any equitable ground whatsoever sets out a cause of action.

The affidavits in the state of case were necessarily printed because of the injunctive relief prayed for, and have no bearing upon the question as to whether or not the bill of complaint sets out a case cognizable in equity.

A R G U M E N T .

P O I N T I .

The bill of complaint sets out a cause of action entitling the complainants to reform the contract.

It is not necessary that there be a mutual mistake in order to decree reformation of a written instrument. Undoubtedly this is the general rule, but it is not inflexible.

A unilateral mistake coupled with fraud is ground for reformation,

Green *v.* Stone, 54 N. J. E., 387;

Whelen *v.* Osgoodby, 62 N. J. E., 571;

Wiswall *v.* Hall, 3 Paige, 313;

2 Pom. Eq. Jur., Sec. 872;

Sloss-Sheffield Steel & Iron Co. *v.* Aetna Life Ins. Co., 74 N. J. E., 635, 646.

In Whelen *v.* Osgoodby (*supra*), Vice-Chancellor Reed says (p. 575):

“If Mr. Osgoodby, who drew this mortgage, wrote the condition, not by mistake, but knowing that it was not as the mortgagees intended, he was guilty of fraud which would justify a rescission or reformation of the mortgage. The circumstances would bring the case within the principal laid down by Mr. Pomeroy that Equity will afford the affirmative relief of reformation when, through fraud of the other party, the instrument fails to express the real relation that existed between the parties.”

Reformation may be granted also where fraud is not so pronounced. Vice-Chancellor Howell, in Sloss-Sheffield Steel & Iron Co. *v.* Aetna Life Ins. Co., 74 N. J. E., 635, 645, says:

“Contracts *inter partes* may be reformed by

this court whenever by reason of a mutual mistake the written instrument fails to express the agreement on which the minds of the parties met, or where there is a mistake by one of the parties and fraud or other inequity attempted on the part of the other."

See also Pom. Spec. Perf., Sec. 870.

By analogy, therefore, the defendant in the instant case inserted the Sixth Clause in the contract without the knowledge and consent of the complainants (Paragraph 11, Bill of Complaint). There is no more material clause in the contract. It is the basis of defendant's complaint in ejectment.

Surely the insertion of this clause without the complainants' knowledge or consent is ground for reformation, if this fact be proven at the hearing. *A fortiori* it is ground for relief at the present juncture when proof is not necessary and only a cause of action need be stated in the facts as pleaded.

The bill alleges that the clause was inserted in the contract without the knowledge and consent of the complainants and

"that the defendant fraudulently and intentionally and in neglect of its legal duty failed to apprise complainants of this condition of the contract"

and

"that they would not have signed the aforesaid contract had they known that the aforesaid clause was contained therein."

The bill further shows (Paragraph 5) that the mistake was induced by the inequitable conduct of the defendant consisting of undue influence and the request that confidence be reposed; that complainants were ignorant, acted without inde-

pendent advice, and that contract was drawn by defendant (Paragraphs 6 and 15).

Can an allegation of fraud that a clause was inserted in a contract without the knowledge and consent of the complainants be set out with more particularity than by the mere recital of the allegation?

Flank this allegation with particulars of the complainants' mental incapacity, and defendant's attitude as above portrayed, and you have ground for reformation of the contract.

POINT II.

The Court of Chancery erred in finding that the facts contained in the allegations of the bill of complaint did not state a cause of action for rescission of the contract.

Complainants entered into the contract under a mistake. Mistake, to quote Pomeroy, 4th Ed., Sec. 839:

"Mistake, therefore, within the meaning of equity, and as to occasion of jurisdiction, is an erroneous mental condition, conception or conviction induced by ignorance, misapprehension or misunderstanding of the truth, but without negligence and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time."

Vice-Chancellor Van Fleet, in *Cummins v. Bulgin*, 37 N. J. E., 477, defined mistake to be "The doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done."

Vice-Chancellor Howell, in *Sloss-Sheffield Steel*

& Iron Co. *v.* Aetna Life Ins. Co., 74 N. J. E., 635, quotes STORY on mistake, as follows:

“Some intentional act or omission or error arising from ignorance, surprise, imposition or misplaced confidence.”

There is no doubt that equity will relieve against the consequence of a mistake of fact.

Graham *v.* Berryman, 19 N. J. E., 29 (Rev. on other grounds, 21 N. J. E., 370);
Smith *v.* Allen, 1 N. J. E., 43.

In the instant case, complainants signed a contract which did not express their intention; a contract which contained provisions of which they were not aware; a contract which they would not have signed had they understood it (Paragraphs 7, 9, 11). It is argued, therefore, that a state of facts appear on the face of the bill which will justify the Court in retaining same, at least, until final hearing.

Equity may interfere even where the mistake of law is pure and simple (Pomeroy, Sec. 482). But the complainants do not maintain that this is an exact analysis of their predicament. On the contrary, complainants contend that the mistake is one of “law accompanied by other special facts giving rise to an independent equity on behalf of the mistaken person, such as inequitable conduct of the other party.”

It is explained in Pomeroy, Sec. 847:

“Mistake of Law Accompanied With Inequitable Conduct of the Other Party.—Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own

légál rights which are to be affected, is induced, procured, aided, or accomplished by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements, or acts of the other party. When the mistake of law is pure and simple, the balance held by justice hangs even; but when the error is accompanied by any inequitable conduct of the other party, it declines in favor of the one who is mistaken. The scope and limitations of this doctrine may be summed up in the proposition that a misapprehension of the law by one party, of which the others are aware at the time of entering into the transaction, but which they do not rectify, is a sufficient ground for equitable relief. A court of equity will not permit one party to take advantage and enjoy the benefit of an ignorance or mistake of law by the other, which he knew of and did not correct. While equity interposes under such circumstances, it follows a *fortiori* that when the mistake of law by one party is induced, aided, or accompanied by conduct of the other more positively inequitable, and containing elements of wrongful intent, such as misrepresentation, imposition, concealment, undue influence, breach of confidence reposed, mental weakness, or surprise, a court of equity will lend its aid and relieve from the consequences of the error. The decisions illustrating this general rule are numerous, and it will be found that many of the cases in which relief has been granted contained, either openly or implicitly, some elements of such inequitable conduct."

The inequitable conduct complained of may be specifically set out as follows:

(a) Defendant's advertisement did not state the

true state of facts and was designed to mislead potential customers (Bill of Complaint, Paragraphs 3 and 6).

(b) The defendant induced complainants to repose trust in it knowing that it could then get the better of them (Paragraphs 5 and 6).

(c) The defendant failed to make mention at any time of the Sixth Clause in the contract, which is the heart of same (Paragraph 11).

This is tantamount to fraud. *Lloyd v. Hulick*, 69 N. J. E., 784.

(d) The aforesaid Sixth Clause appears in an inconspicuous place and is set out in the smallest type in the contract and would obviously deceive the unwary and unsuspecting, let alone the class of people to which the defendant catered (State of Case, p. 15).

(e) The contract does not express the oral agreement (Bill of Complaint, Paragraph 9).

(f) The contract is unconscionable and against public policy in that it obtains money from prospective customers under false pretense. After a sugar coated exordium, the complainants are induced to sign a contract without independent advice and a contract which defendant knows would not be signed if its contents were fully explained (Bill of Complaint, Paragraph 12).

(g) The defendant intentionally built a bungalow in an unworkmanlike manner and of improper material with the knowledge that this action did not conform to its agreement with complainants (Bill of Complaint, Paragraph 12).

It is argued, therefore, that the mistake of the complainants in signing a contract which did not contain their oral agreement coupled with the in-

equitable conduct above set out, entitles the complainants to a rescission of the contract.

In *Sloss-Sheffield Iron & Steel Co. v. Aetna Life Ins. Co.*, 74 N. J. E., 635, Vice-Chancellor Howell speaks as follows:

"It must be conceded, I think, that the insured acted under an erroneous conviction in accepting the policy containing terms which had not been agreed upon. The more invidious view would be that it was imposed upon or became a victim of misplaced confidence. Under either view it is entitled to a decree."

The Court of Chancery has the power to rescind a contract for a mistake that is unilateral. Justice Depue speaking for the Court of Errors and Appeals in *Green v. Stone*, 54 N. J. E., 387, says:

"A Court of Chancery may rescind a contract for mistake which is unilateral. That is, a mistake on the part of one of the parties only. In such a case the whole contract is set aside and the parties restored to their original positions."

To the same effect is *Wirsching v. Grand Lodge of F. & A. M. of N. J.*, 67 N. J. E., 711.

The tendency of the modern practice is to treat mistakes of law as mistakes of fact where possible and to afford relief. But it is contended that the placing of the Sixth Clause aforesaid in the contract without the knowledge or consent of complainants and without their understanding its legal effect can be viewed as a mistake of fact. *Macknet v. Macknet*, 29 N. J. E., 54; *Sweedsboro Building & Loan Ass'n. v. Gans*, 65 N. J. E., 132. To quote from the *Gans* case:

"Our later cases display a desire to discover some ground to rectify an inequitable result flowing from mistakes of all kinds. *Chilvers v. Weston*, 27 N. J. E., 435; *Macknet v. Mack-*

net, 29 N. J. E., 54; *Martin v. New York Susquehanna & Western Railroad Co.*, 36 N. J. E., 109; *Young v. Hill*, 31 N. J. E., 429.

"The ability of courts to rectify mistakes arising from ignorance of the law is everywhere acknowledged to exist in certain instances. The propriety of exercising this power must depend upon the circumstances which surround each case. It will depend upon whether a party who asks relief has been negligent; whether he has been led into his belief by the other parties; whether innocent parties will be injured by a rectification of the mistake, or whether the mistake can be rectified as one of fact although indirectly resulting from a mistaken notion of the law."

But the insertion of the Sixth Clause and other terms not agreed upon in the oral and preliminary agreement in the contract viewed in a positive light, is fraud from the effects of which equity is ever willing to grant relief. *Lloyd v. Hulick*, 69 N. J. E., 784. *Whelen v. Osgoodby*, 62 N. J. E., 571.

To quote from *Lloyd v. Hulick (supra)* :

"The intentional insertion in the deed by the defendants of the restrictive covenants set forth in the bill was in fraud of that right. Its delivery by defendant to complainants without a disclosure of the fact that it contained these covenants was equivalent, it seems to me, to a declaration on their part that the deed was drawn in conformity with the provisions of the contract."

In *Whelen v. Osgoodby (supra)*, the following language of Vice-Chancellor Reed appears :

"If Mr. Osgoodby, who drew this mortgage, wrote the condition not by mistake, but knowing that it was not as the mortgagees intended, he was guilty of fraud which would justify a rescission or reformation of the mortgage."

We maintain, therefore, that the insertion of the

Sixth Clause and other terms by the defendant in a contract drawn by the defendant after having requested complainants to repose confidence and knowing that the complainants were more or less illiterate and with knowledge that the complainants were not represented by an attorney and acted without independent advice and without disclosing these facts to the complainants, was an actual fraud worked upon complainants from the effects of which complainants are entitled to relief.

POINT III.

Appellants were not negligent.

The only question, therefore, which would prohibit equitable relief would be a determination by this Court that complainants were negligent in not discovering this provision. The complainants assert that they were not negligent because they are ignorant people; because they reposed confidence in defendant due to its misrepresentation, imposition, concealment and undue influence; because they were not given sufficient time to examine the contract at the time of signing same; had no independent advice, and because they had no reason to believe such a condition as Clause Six was to be inserted in the contract as the same was never discussed; because the said Clause Six than which there is no more material term in the contract, was printed in an inconspicuous part of said contract with the evident intent to fool unwary parties, and because the complainant, Rebecca Schweitzer, had the contract taken from her hands when she was attempting to read same, and never read as far as the Sixth Clause.

On the question of neglect we invite the Court's attention to Pomeroy, Sec. 856, where it is said:

“It is not every negligence that will stay the hand of the Court. The conclusion from the best authorities seems to be, that the neglect must amount to the violation of a positive legal duty. The highest possible care is not demanded. Even a clearly established negligence may not of itself be a sufficient ground for refusing relief, if it appears that the other party has not been prejudiced thereby.”

The mere fact that complainants did not discover that the Sixth Clause was contained in the contract, is not of itself, evidence of negligence and may be explained. In the case of *Lloyd v. Hulick*, 69 N. J. E., 784, Chief Justice Gummere, speaking for the Court of Errors and Appeals in a case in which a deed was delivered to the complainants, there having been inserted in the deed by the defendant, certain covenants of which the complainants had no knowledge and which had no right to be there, says:

“The intentional insertion in the deed by the defendants of the restrictive covenants set forth in the bill was in fraud of that right. Its delivery by the defendants to the complainants without a disclosure of the fact that it contained these covenants was equivalent, it seems to me, to a declaration on their part that the deed was drawn in conformity to the provisions of the contract. It is true that the complainants might readily have discovered, by examination of the deed before accepting it, that it was not what they had bargained for, and it may be conceded that prudence upon their part required a scrutiny of the deed before its acceptance by them. But I am not able to perceive that their failure to discover the fraud disentitled them to relief. In the transaction of business, men ordinarily deal with one another in the belief that each is honest. If the opposite belief prevailed in such dealings attempted frauds would rarely be successfully carried

into execution and courts would seldom be called upon to grant relief against them. Failure to discover an intended fraud before it has been actually perpetrated must necessarily exist in every case where the courts are appealed to, to relieve the wronged party from its effects, and the fact that the exercise of a greater degree of prudence on the part of him who has been defrauded would have prevented the fraud from being successfully carried through affords no ground for refusing relief."

By analogy, therefore, the mere fact that the complainants did not read the contract nor discover that the Sixth Clause was contained therein, is no ground for this Court refusing to accept jurisdiction.

In determining whether or not a party has been negligent, the Court, to a great extent, will be guided by the inquiry as to whether or not the parties can be placed in *statu quo*, and whether or not in placing the parties *statu quo* this will interfere with the rights of the third party. As it is almost impossible to consider a case where equitable relief from mistake is sought without finding some degree of negligence on the part of the parties seeking relief, it is clear that negligence in itself is not a bar to relief.

In *Institute Bldg., etc., Assoc. v. Edwards*, 81 N. J. E., 359, the Court says:

"It is indeed difficult to conceive of any form of equitable relief from mistakes where some degree of negligence of the party seeking relief is not involved."

In 21 *Corpus Juris* 90, the following rule is laid down:

"But where no one is injured by the mistake other than the party himself and no one has changed his position in consequence of

what has been done and of the mistake, relief may be granted even though a high degree of care has not been exercised. Even gross negligence has been held insufficient to prevent relief for a unilateral mistake made with the knowledge of the other party."

In the instant case, the parties can be placed in *statu quo* without injuring either of them or any third party. Bonds have been filed for the protection of the defendant and the title to the property is in the defendant.

The respondent will undoubtedly rely upon *Fivey v. Penna. R. R. Co.*, 67 N. J. L., 627, to contend that the appellants were negligent in signing the contract. But the instant case is clearly distinguishable.

The above suit was at law. There had not been an oral agreement prior to the signing of the written agreement, confidence had not been reposed in the other party, proof of fraud was limited because the action was at law, and there had been a trial in which testimony had been taken.

The case at bar is in equity where proof of fraud is unlimited, confidence was placed in the respondent at request of respondent, there had been a prior oral agreement, no testimony has been taken and there are specific allegations of inequitable conduct.

We meet the above case with the subsequent ^{case} of *Lloyd v. Hulick*, 69 N. J. E., 784, where the facts are akin to the case at bar and in which case Chief Justice Gummere explains that mere failure to discover fraud and neglect to exercise a degree of prudence affords no ground for refusing relief.

In *Fagan v. Central Railroad Co.*, 94 N. J. L., 454, 459, Justice Trenchard says:

"Now, although as a general rule the affixing of a signature to a contract creates a con-

clusive presumption against the signer that he read, understood and assented to its terms, yet this rule has one notable exception, viz:— Where the signature was procured by fraud or imposition practised upon the signer with intent to deceive him as to the purport of the paper which he signs, and where as here, the evidence tends to show that the defendant's agent knowingly induced the plaintiff to sign a release of all claims for damages by falsely representing to the plaintiff that it was merely a receipt for a partial payment, the question whether the plaintiff is bound by the release is for the jury, and the fact, if it be a fact, that plaintiff wrote above his signature, 'I have read the above and understand it,' and the fact that he would have discovered the fraud alleged to have been perpetrated upon him if he had not negligently failed to read the paper are not in themselves a sufficient reason for directing a verdict, but are merely additional circumstances for the consideration of the jury in determining whether the defendant's agent intentionally deceived the plaintiff into believing that the paper was a mere receipt for partial payment and not a release of all claims."

Therefore, under the peculiar facts of this particular case, it is our conviction that the Court of Chancery erred in dismissing the complaint without at least holding same for the hearing when the question of fact could be more adequately determined.

POINT IV.

The bill of complaint stated a cause of action for rescission of the contract on the ground that the contract was unconscionable and against public policy.

In 21 Corpus Juris, 311, the following appears:

“According to the classification of Lord Hardwicke, fraud may be inferred from the intrinsic nature and subject of the bargain. Where the transaction is in its nature and circumstances such as to give one party an inequitable or unconscionable advantage over the other, equity inferring fraud, will not only decline to lend its aid to the party seeking to enforce such claim, but often actively interferes to give relief to the other party.”

Stanford *v.* Stanford, 87 N. J. E., 475;

Erie R. R. Co. *v.* Delaware, etc. R. Co., 21 N. J. E., 283;

Suffern *v.* Butler, 91 N. J. E., 202 (Aff., 21 N. J. E., 410).

Under the sixth clause of the contract the complainants might pay all of the consideration on account of the purchase price excepting the last payment and defaulting in this, defendant would have the right to keep the moneys thus paid, and also the right to retain the property. Under the terms of the contract the complainants pay the taxes, insurance and other expenses and also 6% interest on account of the purchase price. In other words, the defendant reaps a clean harvest of 6% on his investment, retains the title, has all the expenses of the investment cared for by the complainants and then insists upon keeping all of the purchase price that has been paid.

Surely, this kind of contract should be carefully scrutinized by the Court of Chancery and when

we consider further that the complainants and others in like position (Paragraph 13, Bill of Complaint), are not represented by an attorney, have no independent advice, are in the main, ignorant, and are requested to repose confidence in the defendant, we must conclude that the contract smacks of fraud, is apt to deceive the unsuspecting and should be strictly construed against the party who is responsible for it.

POINT V.

The moneys paid by complainants to defendant constitute a mortgage upon the premises in question.

The complainants agreed with defendants and understood that as they made payments on account of the purchase price they acquired so much title from the defendant. In other words, the amount of money paid by way of purchase price constituted a mortgage on the premises and when the full purchase price was paid the mortgage would be liquidated and title absolute would be in complainants.

The defendants on the contrary contend that the payment by complainants did not constitute a mortgage interest, but were a penalty or liquidated damages running in its favor if complainants should default in any one payment, be it the last.

In the first place the complainants seriously maintain that the sixth clause was injected into the agreement without their knowledge and consent and therefore they did not intend or bargain that the purchase money should constitute liquidated damages.

Aside from the aforesaid contention which has been strenuously rebutted heretofore, the com-

plainants invite the Court's attention to the payments themselves and argue that the figures conclusively prove that the moneys were paid by way of mortgage and not by way of forfeiture. The agreement requires the complainants to pay 6% interest on the purchase price, to pay the taxes, the insurance, and a sum yearly for the overhauling and repairing of the street. Thus the defendant is assured of a net income of 6% on account of its investment, and has absolute protection in that it retains title.

The purchase price is \$2,725, and of this amount \$350 was paid on the signing of the contract and \$20 additional per month is paid from that time until the purchase price is paid in full. Thus the first year the complainants in addition to paying the defendant 6% on its investment together with the taxes, insurance and all necessary expenditures paid the defendant \$590.

As the payments continue, the purchase price remaining unpaid is reduced and when the last payment is made title absolute or the right thereto is in the complainants.

Can it be presumed in the light of these figures that the complainants made payments by way of forfeiture and not by way of mortgage? Can it be presumed that the complainants intended to make this contract for the sole benefit of the defendant? Can it be presumed that the complainants did not understand that they were purchasing the premises in question and that as they made payments they acquired so much title or right to title? The sum which the complainants would have paid under the sixth clause by way of liquidated damages is so unconscionable, so excessive, so out of proportion that the court cannot possibly construe the contract and determine that this provision was a forfeiture.

Equity looks to the substance rather than the form. Equity regards as done that which ought to have been done.

Stockton *v.* N. J. Central Railroad Co.,
50 N. J. E., 52;
21 Corpus Juris, 204.

POINT VI.

The appellants have no adequate remedy at law.

The bill of complaint asks for relief on several grounds inherently founded in equity, viz: reformation, rescission, specific performance and equitable mortgage.

In an action at law the complainants would be forced to sue upon a contract which they claim does not represent the true agreement between the parties.

In an action at law appellants would be bound by clause six of the contract which was conceived in fraud and not binding upon appellants in a Court of Equity.

If the bill of complaint is dismissed, an action in ejectment will lie in favor of the respondent based upon the aforesaid sixth clause.

An action in ejectment has already been instituted in which the respondent claims possession on account of said sixth clause.

Appellants cannot get specific performance in a court of law.

Appellants cannot have the moneys paid on account of purchase price decreed an equitable mortgage in a court of law.

Appellants cannot reform the contract in a court of law.

Appellants would at law be limited in their proof of fraud, that is fraud in the execution of the contract would bound their proof. In equity appellants could prove fraud in the contract in its legal effect.

Eaton *v.* Eaton, 37 N. J. L., 108;
Cummings *v.* Cass, 52 N. J. L., 77, 83.

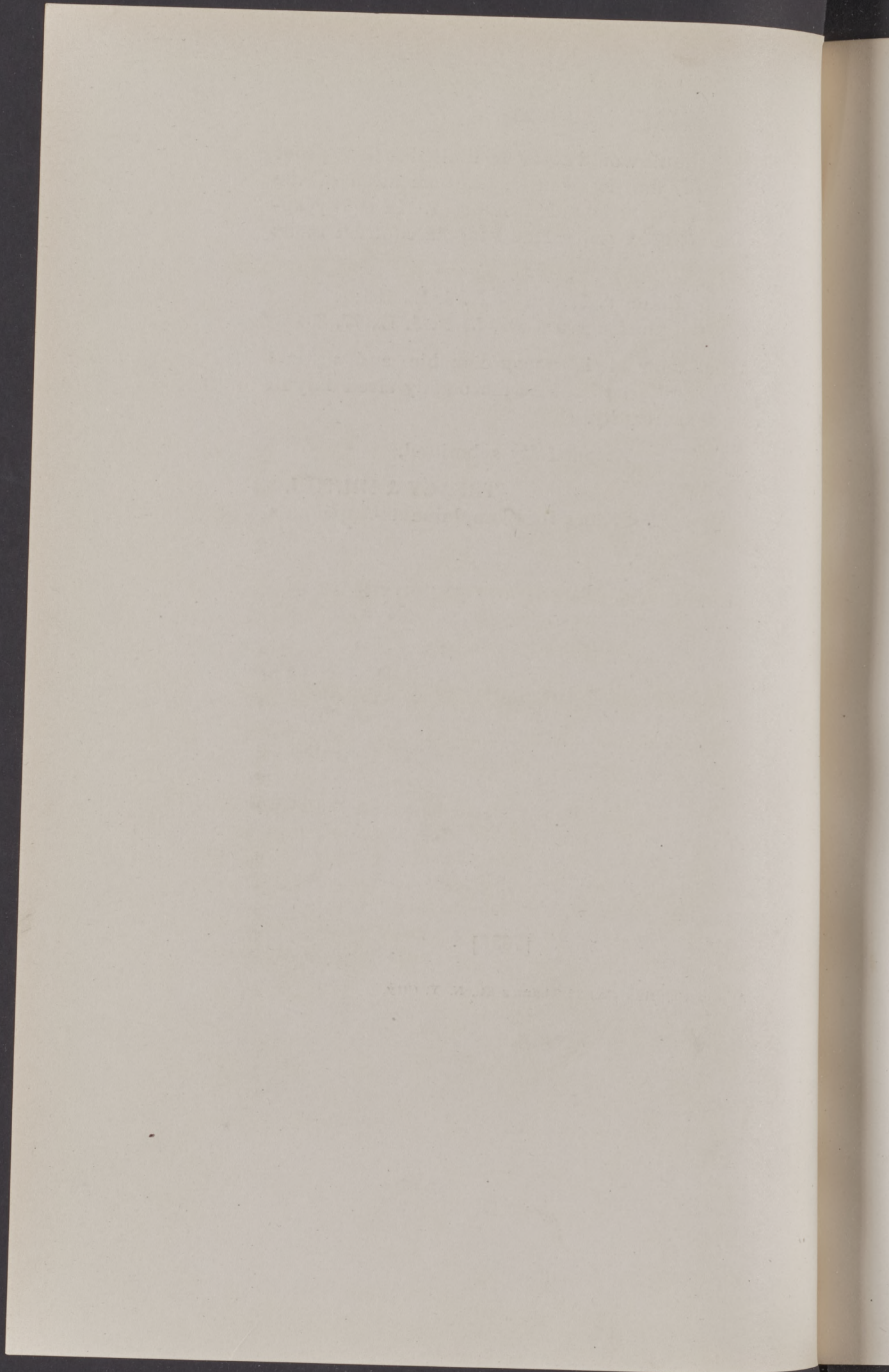
The contract is unconscionable and against public policy and can be thoroughly aired only in a court of equity.

Respectfully submitted,

TREACY & MILTON,
Solicitors for Complainants-Appellants.

JOHN MILTON,
Of Counsel.

[7651]



NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between:
GEORGE SCHWEITZER and
REBECCA SCHWEITZER,
Complainants-Appellants, } On Appeal
—and— } from Court of
NATIONAL HOUSE AND } Chancery.
FARMS ASSOCIATION, Inc., }
a Corporation, }
Defendant-Respondent. }

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BRIEF FOR DEFENDANT-RESPONDENT.

Statement of the Case.

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This is an appeal from a decree in the Court of Chancery, striking out the bill of complaint, advised by Vice-Chancellor Griffin. The opinion of the Vice-Chancellor is found on pages 65-69 in the state of the case.

No statement of the facts in the case is deemed necessary at this time for the reason that counsel feels that the only facts with which this court is concerned are the facts and allegations set forth in the complainants bill. The question is whether these allegations, admitting all of them to be true, are sufficient to justify the relief prayed in the bill of complaint.

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Counsel for the appellants argue six points, namely:

Point No. 1, That the contract should be reformed.

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Point No. 2, That the contract should be rescinded.

Point No. 3, That the appellants were not negligent.

Point No. 4, That the contract is unconscionable and relief should be granted.

10 Point No. 5, That the money paid should be regarded as a mortgage.

Point No. 6, That complainants have no adequate remedy at law. These points will be considered in the order stated.

.. POINT NUMBER ONE.

Complainant's bill does not set forth facts entitling them to reformation of the contract.

20 It is conceded without argument that appellants are entitled to reformation if:

(a) There was a mutual mistake of the parties to the contract.

(b) There was a unilateral mistake coupled by fraud.

30 It is plain from even a casual reading of the bill that there is no allegation of mutual mistake nor is this point argued in the brief. We may, therefore, eliminate this proposition from our consideration at once.

Counsel, however, does argue in their brief that there was a unilateral mistake coupled with fraud and cites authorities, which are not questioned, in support of their right to reformation.

40 There is no doubt that the authorities cited by the appellants in their brief on this point hold that unilateral mistake coupled by fraud is ground for re-

formation. Respondent answers by saying that the allegations in complainant's bill do not bring them within the purview of the cases cited, for the reason that while complainant's bill alleges that the contract executed between the parties does not conform to their oral agreement, yet there is no allegation in the bill setting forth what the oral agreement between the parties was. In the case of *Whelen vs. Osgoodby*, 62 Equity 571, there was a written agreement between the parties which set forth the contract which was the basis of complainant's bill. The defendant, Osgoodby, who was a lawyer in New York State, drew a mortgage which obviously did not conform to the agreement between the parties. The complainants did not discover the fact at the time of accepting the mortgage, and the court reformed the mortgages so as to conform with the terms of the written agreement previously entered into between the parties. Surely, these facts distinguish the case at bar from *Whelen vs. Osgoodby*, because complainant's bill is absolutely barren as to the oral contract actually entered into between the parties.

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The same reason distinguishes the case of *Sloss, Sheffield, Steel & Iron Company vs. Etna Life Insurance Company*, 74 Equity 635 from the case at bar.

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The case of *Green vs. Stone*, 54 Equity 387, while stating the fundamental principle of law argued by counsel for the appellants, is nevertheless not in point for the reason above stated. On the contrary, the court in this case says:

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"To justify the reformation of a deed delivered, accepted and acted upon, on the ground that it did not correctly express the agreement made by the parties, the proof must be clear and convincing and upon testimony that is unexceptionable, **both with regard to the agreement actually made by the parties**, and the mutuality of the mistake through which a different agreement was put in the deed. Until a mistake has been established by such force of proof as leaves no rational

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doubt of the fact, no change in the writing sought to be reformed is entitled to be called a correction."

10 The fraud charged by the complainants is that the sixth clause in the contract was inserted without the knowledge or consent of the complainants. There is no allegation in the bill which points out to us what complainants notion of the contract was. Paragraph nine of the bill of complaint alleges that complainants signed the contract after inspecting same. This paragraph does not allege that complainants did not read the contract before signing same. Under the rule that ambiguous allegations in the bill of complaint must be most sternly read against the pleader, I presume that we are justified in assuming that complainants actually did read the contract before signing same. Is it not singular that the only clause in the entire contract, that complainants did not know about
20 is the sixth clause? This sixth clause is printed in a conspicuous place on the face of the contract, and is not in an inconspicuous place as argued in appellants brief. See the contract on pages 13-17, of the state of the case.

30 There is no allegation of fraud in the making of the contract. There is no allegation that complainants were induced to sign the contract under any representation that it was a receipt or that it was anything else but what it actually was. A general allegation of fraud is not sufficient. Complainants must set out and specifically plead the facts constituting the fraud.

Small vs. Boudinot, 9 Equity 381.

Woglom vs. Kant, 69 Equity 490-495.

40 Complainants argue in their statement of fact that they thought they were signing a contract which would entitle them to an interest in the property as each successive monthly payment was made, and that

they did not know that they might forfeit all moneys paid on account upon breach of the contract. This, in effect, charges that they mistook the legal effect of the contract. This is no ground for relief.

Hawralty vs. Warren, 18 Eq. 124.

Shleam vs. Whittel, 86 Eq. 415.

For the sake of argument, it may be said that even if the court should find that there was an element of fraud in the making of the contract, there could be no reformation in this case for the reason that complainants fail in their bill to set forth what their notion of the contract was, and the court therefore would be at a loss to know how to reform the bill to make it conform to complainants' idea of the contract. Complainants, therefore, in effect, ask the court to make a new contract for them. This the court cannot do. Domestic Telephone Company vs. Metropolitan Telephone Company, 39 Eq. 160, Affirmed 40 Eq. 287. 10 20

See 2 Pomeroy Equity, Sec. 859 at Page 1757.:

"Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of the error."

See also Houpches vs. Resch, 45 Eq. 657.

POINT NUMBER TWO. 30

Complainants are not entitled to rescind on the ground of mistake because their mistake, if any, was caused by negligence, and for the further reason that they did not rescind promptly upon discovering the fraud or mistake, and have by their actions elected to affirm the contract.

Respondent in the argument under this point will cover Points two and three of Appellant's brief. 40

Counsel for the respondent does not contest the right of this court to rescind a contract that is entered into in consequence of a mistake of fact. No comment will therefore be made upon the authorities cited by the appellants in support of this fundamental proposition.

10 Pomeroy's definition of mistake, found in section 839 of his work, is cited by the appellants. Let us pause for a moment and analyze this definition. Mistake, according to Pomeroy, within the meaning of equity, is "an erroneous mental condition, conception or conviction, induced by ignorance, misapprehension or misunderstanding of the truth, **but without negligence.**" There is nothing in complainants' bill which would lead us to conclude any erroneous mental condition under which complainants labored at the time of signing the contract was induced by either misapprehension or misunderstanding of the truth, because there is no allegation in the bill which sets forth
20 any representations made by the defendants as to the contract. Complainants' erroneous mental condition, therefore, was induced by ignorance of the fact that the contract contained the sixth clause. This ignorance was not induced by any representation made by the defendants that this clause was not in the contract. It was induced rather by complainants' failure to discover that the sixth clause was in the contract, although they were afforded an opportunity to read
30 it. We may infer from the ninth paragraph of the bill of complaint, that complainants actually did read the contract, so that their ignorance in this regard was the result of their own negligence.

It is well settled in this State that where the mistake is caused by negligence, that the courts will not rescind the contract. See *Dillette vs. Kendall*, 25 Eq. 66. *Haggerty vs. Macan*, 25 Eq. 48, *Vorhees vs. Murphy*, 26 Eq. 434.

40 In the case of *Twaites vs. Pennsylvania Railroad Company*, 77 Eq. 103 at Page 112, the court said:

“Unless, therefore, this court is prepared to decide that a man is not bound by a perfectly clear and unambiguous contract which he has read and signed, if he will swear that he has forgotten its terms, it cannot properly decide with the complainant in this suit.”

So in the case at bar, this court would have to decide that complainants' mere charge that they did not know of the existence of the sixth clause of the contract, although they had been afforded an opportunity to read the contract, and had actually signed it, entitles them to relief. 10

Complainants on page ten and eleven of the appellants' brief set forth what they claim to be the inequitable conduct of the defendant. These charges may be answered briefly as follows:

(a). The contract signed by the complainants sets forth that the property is in the Township of Piscataway. The complainants visited and viewed the property before entering into the contract. 20

(b). There was no trust relationship between the parties. It was a business transaction between parties *suijuis*.

(c). The sixth clause was plainly printed on the face of the contract and complainants signed same after reading it.

(d). The charge that the sixth clause appears in an inconspicuous place in the contract is positively false. This clause is printed in the same type as the rest of the contract and appears in its proper order and place, being the sixth clause in the contract. 30

(e). What is the oral agreement that the bill of complaint does not express? Complainants fail to state in their brief what the oral agreement was.

(f). The contract is not unconscionable, but is fair in all its terms and agrees to sell a house and a 40

lot for the small sum of \$2,725.00. If the complainants wanted independent advice, it was their privilege to secure same, and the defendant is not chargeable with their default in this regard.

10 (g). The building constructed for the complainants was exactly as represented. It would be suicide for the defendant to execute a contract providing for payment over a long term of years, unless it rendered value for the consideration mentioned in the contract.

20 Counsel for the appellants cite the case of Fagan vs. Central Railroad Company, 49 L. 454, 111 Atl. 32, as an authority for the proposition that the negligence of the complainants does not bar their claim to relief. A glance at this case is sufficient to convince one that it is not authority for this proposition. In Fagan vs. Central Railroad, *Supra*, the plaintiff was induced to sign a paper which was represented to be a receipt for money paid, whereas, in fact, it was a general release of plaintiff's claim against the defendant company. The court here held that the question of fraud in procuring his signature was a question of fact for the jury. There is nothing in complainants' bill which charges that complainants' signatures to the contract were procured by fraud.

In the case of *Fivey vs. Pennsylvania Railroad*, 67 Law 627, it was held:

30 "Where a party attaches his signature to a contract, otherwise valid, a conclusive presumption is created, except as against fraud, that the signer read, understood and assented to its terms."

The case of *Fivey vs. Pennsylvania Railroad*, *Supra*, was cited and approved in this court. See *Twaites vs. Pennsylvania Railroad*, 77 Eq. 103 at 111.

40 On the question of rescission, it is submitted that the appellants by their actions foreclosed their right in this regard. The bill of complaint shows that the contract in question was entered into on November

28th, 1919. The building was at this time being erected on the property described in the contract. (See copy of the contract page 14). The complainants allege in (Paragraph 12 in the bill of complaint), that they took possession of the property in March of 1920. During all this time complainants had an opportunity to examine the premises and the building being erected thereon. They took possession of the property in March 1920 and made their regular monthly payments from that time until about the month of November 1920, when they stopped making payments. (See page 3 appellants' brief). In the month of March 1921, appellants engaged counsel. (See paragraph thirteen of bill of complaint.). Shortly thereafter the defendant started suit in ejectment and soon after that time, appellants filed their bill in this court. Appellants set up in paragraph twelve of their bill that the building erected upon the premises described in the contract did not conform with the agreement. Complainants knew that fact when they took possession in the month of March 1920. If defendants had not complied with the contract, appellants should have rescinded the contract at that time. Instead, however, they took possession of the property and made their monthly payments on account from that date up until November 1921 when they discontinued further payments. Even then, they did not advise the defendants that they intended to rescind the contract. They simply refused to make further payments, and no payments have since been made by them. In the month of March, when they interviewed counsel, they did not even then express their intention to rescind the contract, nor have the complainants since that date expressed their intention to rescind the contract because they had ever since continued in possession of the property notwithstanding the fact that the defendants have repeatedly asked for possession of the property and exercised every remedy which the law allows to secure possession.

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This action on the part of the appellants amounts to an election to affirm the contract. See the case of *Dennis vs. Jones*, 44 Eq. 513, where it was held:

“The defrauded party to a contract has but one election to rescind which he must exercise with reasonable promptitude after the discovery of the fraud and when once he elects, he must abide by his decision.

10 Delay in the rescission of the contract, payments in pursuance of it, and continued dealing with it and with reference to the fraudulent transaction, after discovery of the fraud, may be shown as evidence of an election to treat a fraudulent contract as valid.”

In the case of *Clampitt vs. Doyle*, 73 Eq. 678, the court said at page 679:

20 “There is in fine, in equitable contemplation, but one juncture at which a purchaser who has been induced by fraud to enter into a contract of sale, may elect on that account to rescind the contract, and that is upon his discovery of the fraud or within a reasonable time thereafter.”

In the case of *Faulkner vs. Wassmer*, 77 Eq. 537, the complainant purchased property under the representation that same was restricted. She learned otherwise, and filed her bill in this court to rescind the deed. The fraud was discovered by her about July 10th. Her bill was filed on November 28th. The court said:

30 “We agree with the learned Vice-Chancellor that Mrs. Faulkner purchased the lot in question upon an untrue representation of such a nature, that upon the discovery of its untruth, she was entitled to elect to rescind the sale. We do not, however, agree that such election was still open to her four months later when the present bill of complaint was filed declaring for the first time her election to rescind.”

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The court pointed out that this decision was based not upon the doctrine of laches, "but upon the ground that the lapse of such a time under the circumstances afforded plenary proof of an election by her not to rescind to which conclusive effect should have been given."

Any right that the appellants might have to rescind is clearly barred by the decisions in the above cases. Appellants have not even to this date evidenced their desire to rescind the contract, because if they had they would have delivered up possession of the property and advised defendants that they intended to rescind. Appellants are in the anomalous position where they hold tenaciously to the possession of the property which they gained through the very instrument which they now cry so loudly to rescind.

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POINT NUMBER THREE.

The contract is not unconscionable and should not be rescinded.

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Appellants sole argument under this point is that the contract contains the sixth clause which provides for a forfeiture upon breach of the contract by the appellants. It is therefore unconscionable and equity should grant relief. See 21 C. J. Page 100.

"Forfeitures are not regarded with favor, and a jurisdiction similar to that in the case of penalties is exercised by equity to relieve against the consequences of forfeitures incurred at law, the rule being that such relief will be given where compensation can be fully made on the tender or payment of such compensation....."

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"It (referring to the jurisdiction of the court in equity), does not extend so far as to authorize a court of equity to disregard and set aside the valid stipulation of the parties upon the performance of which their rights are made to depend."

See also *Roach vs. Hiss*, 84 Eq. 242.

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In the case at bar, complainants who are seeking relief against the forfeiture, have made no tender of payment nor is there any offer in their bill. The jurisdiction of this court should not be invoked to aid defaulting parties who refuse to respect the obligation of contract.

10 It must be remembered that the appellants are in default and are nevertheless asking relief because of a condition which they have voluntarily brought upon themselves. There is apparently a distinction made by the courts in granting relief against penalties and forfeitures. See 21 C. J. 384, Sec. 81.

20 “Both because penalties and forfeitures are usually harsh and oppressive and because they can ordinarily be enforced at law, courts of equity generally refuse to aid in their enforcement, even though the case may be one in which no equitable relief would be given to the defaulting party against the forfeiture.”

In the case at bar it is the defaulting party who is seeking relief notwithstanding the fact that they decline to offer compensation to the defendants. See 21 C. J. 313, Sec. 80,

“Equity will not relieve against a plain violation of a contract without any circumstances of justification or excuse.”

30 See also note 57 and authorities cited. 21 C. J. 106. Also 21 C. J. Page 112, where it is said:

“No ground for equitable relief is shown by the mere fact that the party invoking the aid of the court has made an improvident contract.”

40 The courts of equity will not inquire into the prudence of a contract where the parties entering into same are competent to enter into a contract and no trust relationship exists between them.

POINT NUMBER FOUR.

The moneys paid by the complainants should not be regarded as an equitable mortgage and enforced as such.

It must be remembered in considering this proposition that the contract in question embraces a consideration of only \$2725.00. Complainants have been in possession since the month of November, 1919. They have paid on account of the purchase of the property approximately \$500.00 in cash and have a bond filed in the amount of \$700.00 to secure defendants for their cost and reasonable compensation, should this suit be determined against the appellants. As the matter now stands before this court, complainants have paid in the sum of approximately \$500.00. They have enjoyed the use of the premises since November 1919 and if the contract should now be rescinded, defendants would suffer a substantial loss for the reason, first, that the moneys paid by appellants is not a fair rent of the property for the period during which they occupied same, and second that the building in question was erected when construction costs were at their highest point and the building could now be erected for twenty-five per cent. less than its original cost. Should defendants regain immediate possession of the property, they will be obliged to take a loss because of appellants breach of contract.

POINT FIVE.

Appellants have an adequate remedy at law.

There can be no question that the facts set forth in complainants' bill allege a breach of contract. If the defendants did not erect a building on the property as agreed, appellants had their remedy in March 1920 and this remedy was open to them thereafter

at any time they chose to enforce it. It was their privilege to sue for breach of contract or else make the necessary repairs to the property themselves, and sue the defendant for cost thereof. By their continued default, appellants compelled defendant company to proceed against them in ejectment at law so that by their own artful negligence, appellants have worked themselves into a position where they now claim relief under the protecting arm of this court on the theory that they have no adequate remedy at law. This court should not assist them after the lapse of two years time when they have willfully and continuously closed their eyes to the legal remedy which was opened to them.

It is respectfully submitted that complainants' bill fails to set forth a cause of action cognizable in this court. Appellants complain of a bad bargain, but this is not sufficient ground to confer jurisdiction in this court. The learned Vice-Chancellor who dismissed this bill makes the pertinent remark in the opinion filed by him in this cause. "I think it is apparent from a reading of the bill that the objections of the complainants is addressed almost solely to the failure of the defendant to build a bungalow in accordance with the contract, and all the other allegations in the bill are mere embellishments."

It is respectfully submitted that the decree of the court of Chancery be affirmed.

Respectfully submitted,

JOHN E. TOOLAN,

Solicitor for and of Counsel with
Defendant-Respondent

