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New Jersey State Library

Notice of Appeal.

(Filed November 23, 1927.)

10

The complainant, Columbia Mortgage Company, a corporation of New Jersey, hereby appeals from the final decree made in the above entitled cause on November 1, 1927, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated November 2nd, 1927.

20

JOSEPH M. ALSOFROM,
Solicitor for and of Counsel
with Complainant.

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

JOSEPH M. ALSOFROM,
Of Counsel with Complainant.

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Amended Notice of Appeal.

(Filed December 5, 1927.)

The complainant, Columbia Mortgage Company, a corporation of New Jersey, hereby appeals from the final decree made in the above entitled cause by the Chancellor on the advice of Vice Chancellor Berry, on November 1, 1927, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated November 29, 1927.

Joseph M. Alsofrom,
Solicitor for and of Counsel
with Complainant.

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

Joseph M. Alsofrom,
Solicitor for and of Counsel
with Complainant.

Petition of Appeal.

(Filed November 27, 1927.)

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Columbia Mortgage Company, a corporation of New Jersey, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date November 1, 1927, in a certain cause in said Court of Chancery wherein the said Columbia Mortgage Company was complainant and the said J. Fred Stephenson and Louise Stephenson were defendants, in this respect, to wit, that the said decree adjudges that the bill of complaint herein be dismissed.

2. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that: The Court of Equity has jurisdiction; because the remedy at law is inadequate, indefinite and uncertain; the Court of Equity has inherent and general jurisdiction in cases of fraud; the Court of Equity will take jurisdiction in matters of fraud when it is doubtful whether the complainant may be relieved in the court of law; and in that the Chancellor denied an order for leave to amend the bill of complaint.

Petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, wholly reversed, set aside and for nothing holden, and that the petitioner may have such

other relief in the premises as to this court shall seem proper.

JOSEPH M. ALSOFROM,
Solicitor for and of Counsel
with Appellant.

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Affidavit of Service.

(Filed November 30, 1927.)

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

LOUIS WILDER, being duly sworn according to law, on his oath deposes and says:

On Friday, November 25, 1927, I served a true copy of the petition of appeal, filed in the above matter, on I. Benjamin Glueckfield, at his office, 60 Park Place, Newark, N. J., by leaving the same with Emily Reinhardt, the person in charge thereof.

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LOUIS WILDER.

Sworn and subscribed to before me }
this 28th day of November, 1927. }

GERTRUDE EDWARDS,
Notary Public,
of New Jersey.

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Answer to Petition of Appeal.

(Filed November 28, 1927.)

The answer of the above named defendants-appellees to the petition of appeal of the above named complainant-appellant.

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

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I. B. GLUECKFIELD,
Solicitor for and of Counsel with
Defendants-Appellees.

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(Filed September 15, 1927.)

IN CHANCERY OF NEW JERSEY.

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

10 The complainant, Columbia Mortgage Company, a corporation of the State of New Jersey, having its principal office at #921 Bergen Avenue, Jersey City, New Jersey, respectfully shows that:

1. On the 23rd day of June, 1926, J. Fred Stephenson and Louise Stephenson, his wife, the defendants herein made a contract in writing wherein the said defendants agreed to convey to complainant two tracts of land being 337.50 acres and 317 acres respectively according to a survey 20 made by R. F. Rutter, in 1912, a map of which survey was filed with said agreement; copy of said agreement and survey being particularly set out and marked Exhibit "A" and made part hereof.

2. Said agreement also contained a description to the effect that the land lay partially on Barnegat and Budd Town Road, with an approximate frontage of one mile, and known as Hog Back Hill and Plains tract. Said agreement also contained 30 a clause making the time for the performance of the contract of the essence of said agreement.

3. Before the execution of said agreement, the defendant, J. Fred Stephenson and his agent Alphonse W. Kelley, went upon the land with complainant's representative and pointed out to said complainant's representative the exact location of the said lands and said Hog Back Hill, with particular reference to said Rutter's survey.

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4. Defendants informed complainant that they had a title policy from the Ocean County Title Company, and that the title to same was guaranteed, and in order to expedite the passing of title, defendants referred complainant to said Ocean County Title Company, who reported upon 10 the title as being in the defendants in fee, but excepted to the survey.

5. Because time of passing title was of the essence in said contract, complainant relying upon the warranties mentioned in said contract, paid to defendants the sum of $9,250.00 in accordance with the terms of said contract and said defendants executed and delivered a general warranty deed containing the following warranties: namely, that the 20 defendants were the true and lawful owners of the said premises; that the said premises were free of any encumbrances; that they had a good right, full power and lawful authority to convey the said lands and premises; and that they would secure and forever defend the said lands and premises to the said complainant; a copy of said deed is hereto annexed and marked Exhibit "B."

6. Complainant believing at all times that it 30 had a good and marketable title to said lands mentioned in Rutter's survey, took possession of said lands and caused same to be fully staked and outlined by one Roy T. Havens, Civil Engineer and Surveyor, who followed the Rutter's survey above mentioned as his basis for his survey.

7. Shortly after the complainant had taken possession of said lands and premises mentioned in Rutter's survey, complainant was informed by one Adolph H. Friedman that the said Friedman had 40 a paramount title and owned the said lands and premises in fee.

8. Thereupon complainant caused an examination of the records on file with the General Surveyor's Office in Burlington County, N. J., and discovered that defendants did not have title to the lands and premises described in said Rutter's survey and therefore could not convey said lands and premises described in Rutter's survey; but that the defendants were seized in fee of approximately the same amount of acreage contained in Rutter's survey, and said lands consisted of two separate and distinct tracts of land located in an entirely different place, and assuming a contrasting difference in appearance than that mentioned in the Rutter's survey. A copy of said two tracts is hereto annexed and marked Exhibits "C" and "D" respectively.

9. Complainant relying upon the warranties contained in said deed, at all times believed that it had acquired the lands mentioned in Rutter's survey, and upon finding out that by the conveyance of said deed had not acquired title to the premises as described in Rutter's survey, complainant on November 12th, 1926, caused a letter to be written to the defendant J. Fred Stephenson, demanding the return of the moneys paid and tendered a deed of reconveyance to the defendants, a copy of which letter is hereto annexed and marked Exhibit "E." Defendants, however, refused to accept the deed of reconveyance and refused to return the moneys paid by complainant.

10. Complainant, therefore, was obliged to take possession of the premises marked Exhibits "C" and "D" and was also obliged to dispose of part in order to realize some cash which it needed in order to carry on its business.

11. The premises marked Exhibits "C" and "D" are far below the value of the lands and premises described in said Rutter's survey, in that the land in said Rutter's survey while described as two tracts of land, are contiguous to each other and rectangular in shape and contains not more than six courses and has a frontage on Budd Town Road of 6,402 feet; whereas, the lands described in Exhibits "C" and "D" consist of two separate and distinct tracts of land distant about two miles each from the other. The tract of land as shown in Exhibit "C" contains about twenty courses and has a frontage on said Budd Town Road of 4,500 feet. The tract as shown in Exhibit "D" has no highway frontage whatever and is distant about two and one-half miles from said Budd Town Road and contains about fifty courses.

12. Complainant charges that said conveyance by defendants was made either by mistake of fact or that the defendants conveyed to complainant the property mentioned in Exhibits "C" and "D" and thereby fraudulently misrepresented to the complainant that they had title to premises as described in Rutter's survey.

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

1. That J. Fred Stephenson and Louise Stephenson, who are the defendants to this suit, may answer this Bill of Complaint and each statement therein made.

2. That the defendants be decreed to pay back to complainant the difference between the value of the lands and premises mentioned in Exhibits "C" and "D" and the sum of $9,250.00, being the purchase price paid for the lands and premises

mentioned in Rutter's survey, and marked Exhibit "A" and any and all expenses incurred and damages sustained by the complainant by reason of the failure of the warranties in the said deed, and the misconduct and inequity on the part of the
10 defendants.

3. That the complainant be decreed to have a good title to the lands described in Exhibits "C" and "D."

4. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make and such further relief as the Court may deem just and equitable in the premises.

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JOSEPH M. ALSOFROM,
Solicitor for and of
Counsel with Complainant.

EXHIBIT "A."

ARTICLES OF AGREEMENT, made the day of June, in the year of Our Lord One Thousand Nine Hundred and twenty-six, BETWEEN, J. Fred Stephenson and Louise Stephenson, his wife,
30 of the Township of Lakewood in the County of Ocean and State of New Jersey, of the First Part; AND Columbia Mortgage Co. a corporation existing by virtue of the laws of State of New Jersey with its principal office at 921 Bergen Ave. in the City of Jersey City, in the County of Hudson and State of New Jersey, of the Second Part;

WITNESSETH that the said party of the first part, for and in consideration of the sum of Eleven
40 Thousand One Hundred Twenty-six and 50/100 to

be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that the said party of the first part, will well and 10
sufficiently convey to the said party of the second part, heirs and assigns, by Deed of warranty free from all encumbrance on or before the twenty-fourth day of July next ensuing the date hereof, all those lots, tract, or parcel of land and premises, hereinafter particularly described situate, lying and being in the Township of Union in the County of Ocean and State of New Jersey.

Two tracts of land being 337.50 acres and 317 acres respectively according to a survey made by 20
R. F. Rutter in 1912, a map of which is filed with this agreement, and being the same premises conveyed by Matilda W. Freeston and Arthur Freeston her husband to J. Fred Stephenson by deed dated and recorded in Ocean County Clerk's office in Book page Said land lying partially on Barnegat to Buddtown Road and with an approximate frontage on same of one mile, and known as Hog Back Hill and Plains tract. totaling in said tract 654.50 acres, more or less. 30

Consideration to be at the rate of $17.00 per acre on this tract and proper adjustment to be made on basis of acreage as disclosed by survey.

AND the said Columbia Mortgage Co. for its successors and assigns doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, that the said party of the second part will pay and satisfy or cause to be paid and satisfied, unto the 40
said party of the first part the said sum of ELEVEN

THOUSAND ONE HUNDRED TWENTY-SIX and 50/100 as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say

$500.00 Five Hundred Dollars on the signing of this contract

500.00 Five Hundred Dollars on or before July 5, 1926

3,126.50 on delivery of deed.

7,000.00 first mortgage as part of purchase price, covering the premises in question, to run for one year from date and to bear interest at the rate of six per cent per annum. Said mortgage shall also contain a release clause, showing that said mortgagee will release portions of the premises in question in blocks of not less than 100 acres at any one time on payment as below:

First releases to be made at the south end of the 337 acre tract, and next releases on next adjoining land in the south east end of 337 acre tract at the rate of $20.00 per acre. No releases shall be made from the west tract of 317 acres until the aforesaid mortgage shall have been reduced to the sum of Two thousand Dollars, and then only from the end of the tract and on a basis of Fifty Dollars per acre for lands so released.

Said mortgage shall contain a clause permitting the filing of maps for the purpose of laying out streets on said property.

Taxes to be adjusted as of date of settlement. It is further agreed between parties hereto that

if cash settlement is made in full for premises above on or before July 22, 1926, then and only then, the full consideration shall be made Nine Thousand Two Hundred Fifty Dollars or a reduction of Eighteen hundred and seventy-six dollars, from the original price named above for said full cash settlement in lieu of mortgage. Said cash option expires July 22, 1926, and time is the essence of this contract.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, heirs and assigns, may enter into and upon the said land and premises on the 22nd day of July next ensuing the date hereof, and from thence take the rents, issues and profits to and their use.

AND IT IS FURTHER AGREED by the parties hereto that the said Deed shall be delivered and received at First National Bank of Barnegat, N. J. between the hours of nine in the forenoon and three o'clock in the afternoon on the said twenty-second day of July next ensuing the date hereof.

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of.................................... which they hereby fix and settle as liquidated damages therefor.

IN WITNESS WHEREOF the said parties have here-

unto interchangeably set their hands and seals the day and year first above mentioned.

J. Fred Stephenson
Louise Stephenson

Signed, sealed and delivered
in the presence of

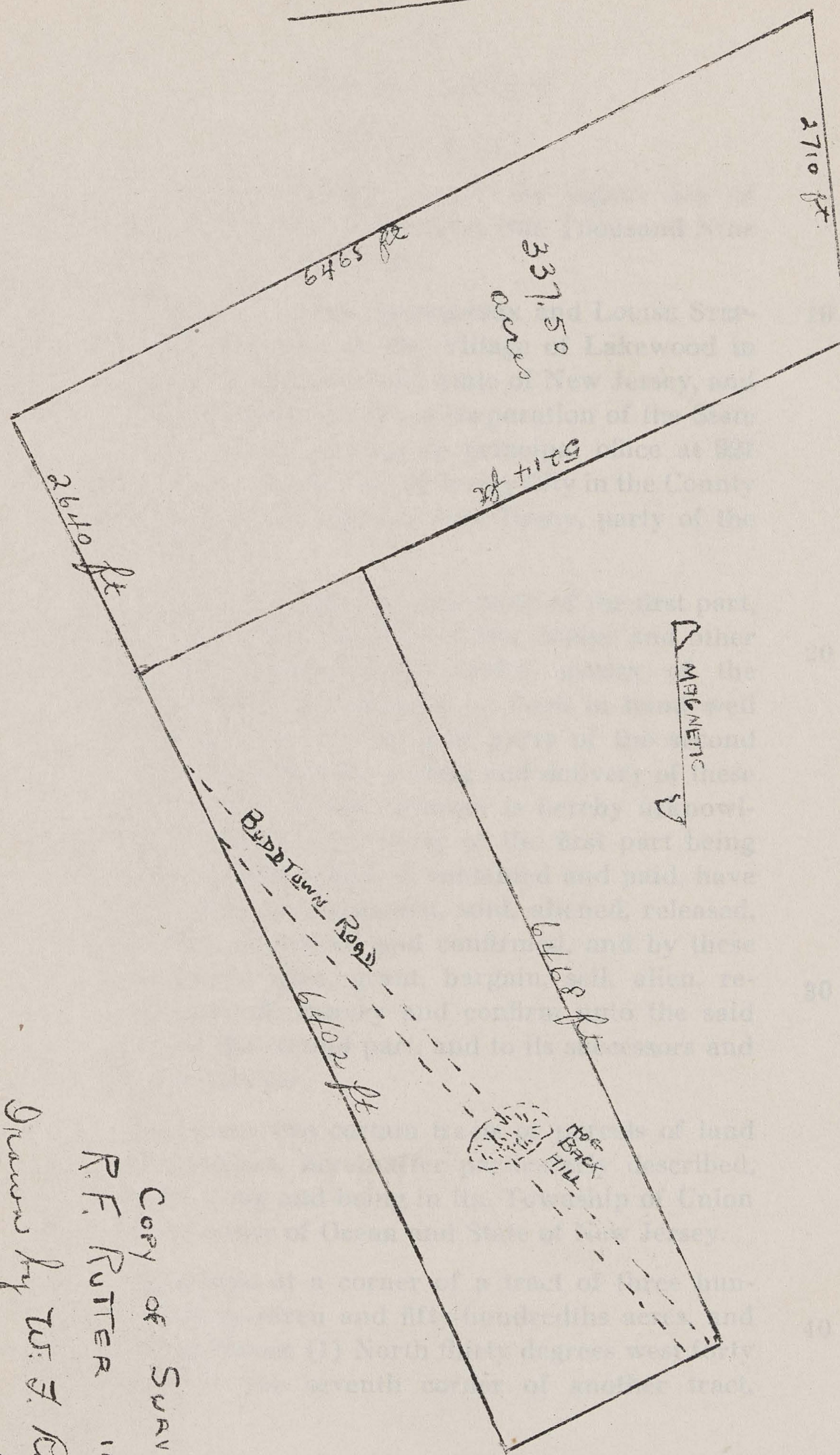
J. W. Mathews as to J. F. Stephenson
and Louise Stephenson

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

Be it Remembered, that on this 23rd day of June in the year of Our Lord One Thousand Nine Hundred and twenty-six before me, J. W. Mathews, Notary Public personally appeared J. Fred Stephenson, who, I am satisfied is the grantor in the within Agreement named; and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

And the said Louise Stephenson being by me privately examined separate and apart from her husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, Freely, without any fear, threats or compulsion of her said husband.

J. W. Mathews
(Seal) Notary Public



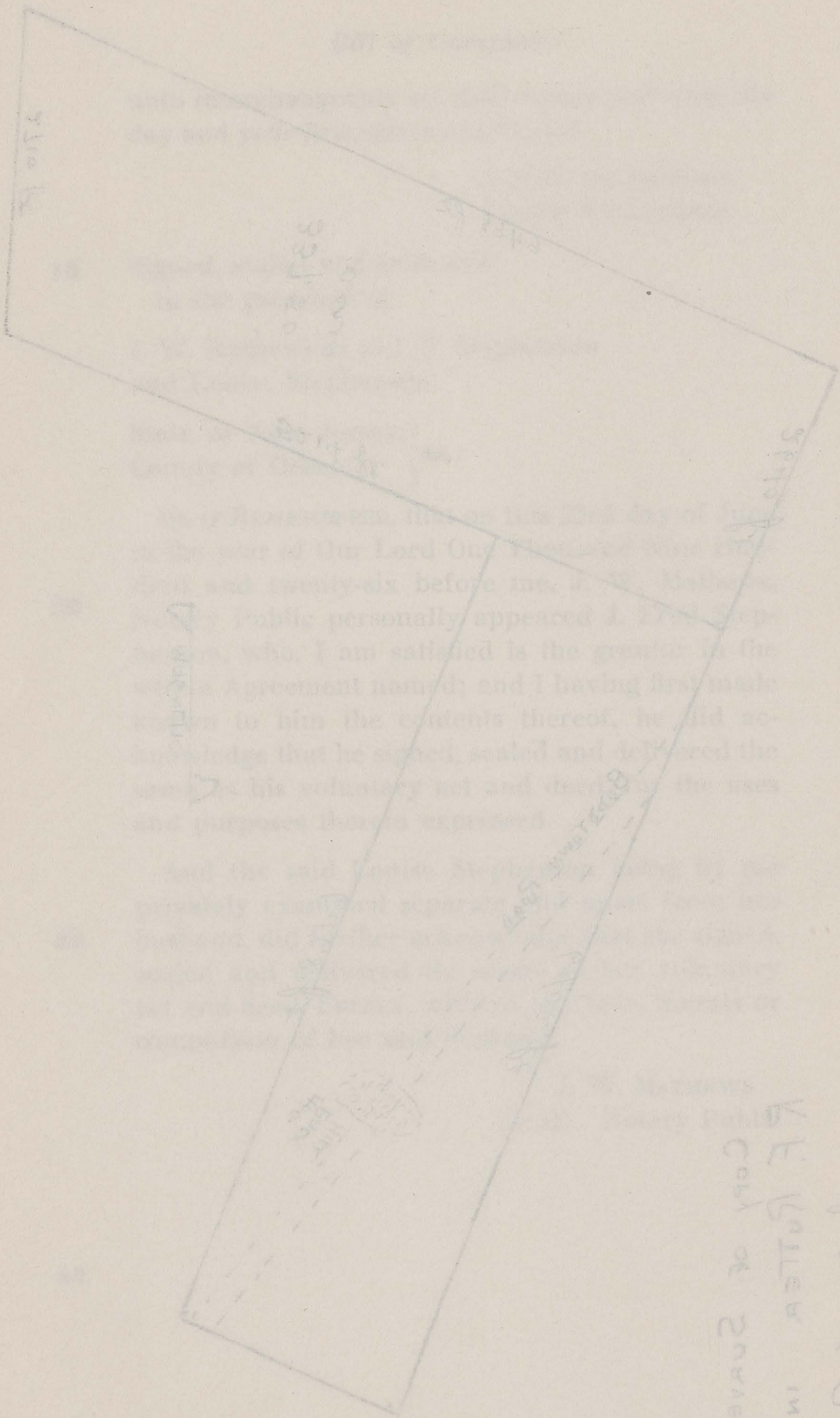


EXHIBIT "B."

THIS INDENTURE, made the eighth day of July, in the year of our Lord One Thousand Nine Hundred and twenty-six,

Between, J. Fred Stephenson and Louise Stephenson, his wife, of the Village of Lakewood in the County of Ocean and State of New Jersey, and Columbia Mortgage Co., a corporation of the State of New Jersey, having its principal office at 921 Bergen Ave. in the City of Jersey City in the County of Hudson and State of New Jersey, party of the second part;

Witnesseth, that the said party of the first part, for and in consideration of One Dollar and other valuable considerations, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to its successors and assigns, forever.

All those two certain tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Township of Union in the County of Ocean and State of New Jersey.

Beginning at a corner of a tract of three hundred thirty-seven and fifty-hundredths acres, and running thence (1) North thirty degrees west forty chains to the seventh corner of another tract,

which tract is part of one thousand five hundred and eight acres, returned to J. P. Browning; thence (2) South sixty-three degrees thirty minutes West seventy-nine chains to a point; thence (3) South four degrees thirty minutes East forty-one chains 10 to a point; thence (4) North sixty-three degrees thirty minutes East ninety-eight chains to the place of beginning. Containing three hundred and thirty-seven acres, more or less.

SECOND TRACT:

Beginning at the Second corner of the first named tract, and also in the seventh corner of a survey made to J. R. Shreve for one thousand five hundred thirty eight acres, in 1861, of which this 20 is a part, and runs (1) North thirty degrees West ninety-seven chains to a point; thence (2) South sixty-three degrees thirty minutes west thirty-three chains forty links to a point; thence (3) South thirty degrees thirty minutes east ninety-eight chains to a corner; thence (4) North sixty-three degrees thirty minutes East thirty-three chains and forty links to the place of beginning. Containing three hundred and seventeen acres, more or less.

30 The above descriptions are taken from a survey made by Robert F. Rutter of West Creek, New Jersey.

Being the same premises conveyed to the said J. Fred Stephenson by deed from Matilda J. Freeston and Arthur Freeston, her husband, dated February 15, 1926 and recorded February 18, 1926, in Book 678 of Deeds for Ocean County, page 218.

Together with all and singular the houses, 40 buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining;

Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof.

To Have and to Hold, all and singular the above 10 described land and premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever.

And the said J. Fred Stephenson and Louise Stephenson, his wife do for themselves, their heirs, executors and administrators covenant and agree to and with the said party of the second part, its successors and assigns, that the said J. Fred Step- 20 henson and Louise Stephenson are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part hereby 30 made or intended to be made, for the above described land and premises, can or may be charged, altered or defeated in any way whatsoever.

And Also that the said party of the first part now have good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid;

And Also that they, the said J. Fred Stephenson and Louise Stephenson will warrant, secure and 40 forever defend the said land and premises un-

to the said Columbia Mortgage Co., its successors and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

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

J. Fred Stephenson (Seal)
Louise Stephenson (Seal)

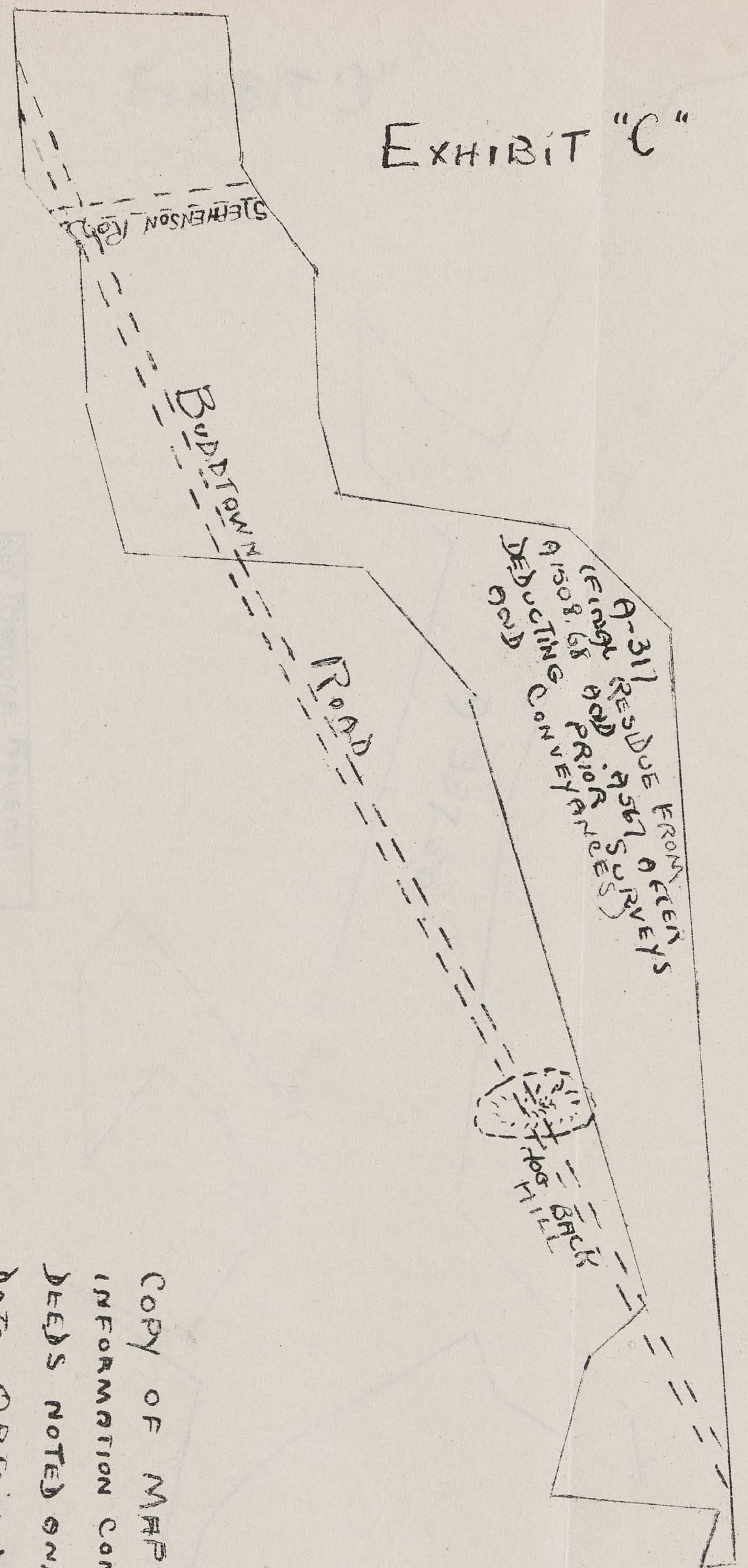
Signed, sealed and delivered in
the presence of:

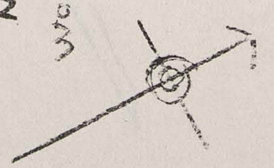
J. W. Mathews

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

Be it Remembered, that on this 8th day of July, in the year of our Lord One Thousand Nine Hundred twenty-six, before me the subscriber a Notary Public of the State of New Jersey, personally appeared J. Fred Stephenson and Louise Stephenson, his wife, who, I am satisfied are the grantors mentioned in the within deed, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed; and the said Louise Stephenson being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, Freely, without any fear, threats or compulsion of her said husband.

J. W. Mathews
(Seal) Notary Public

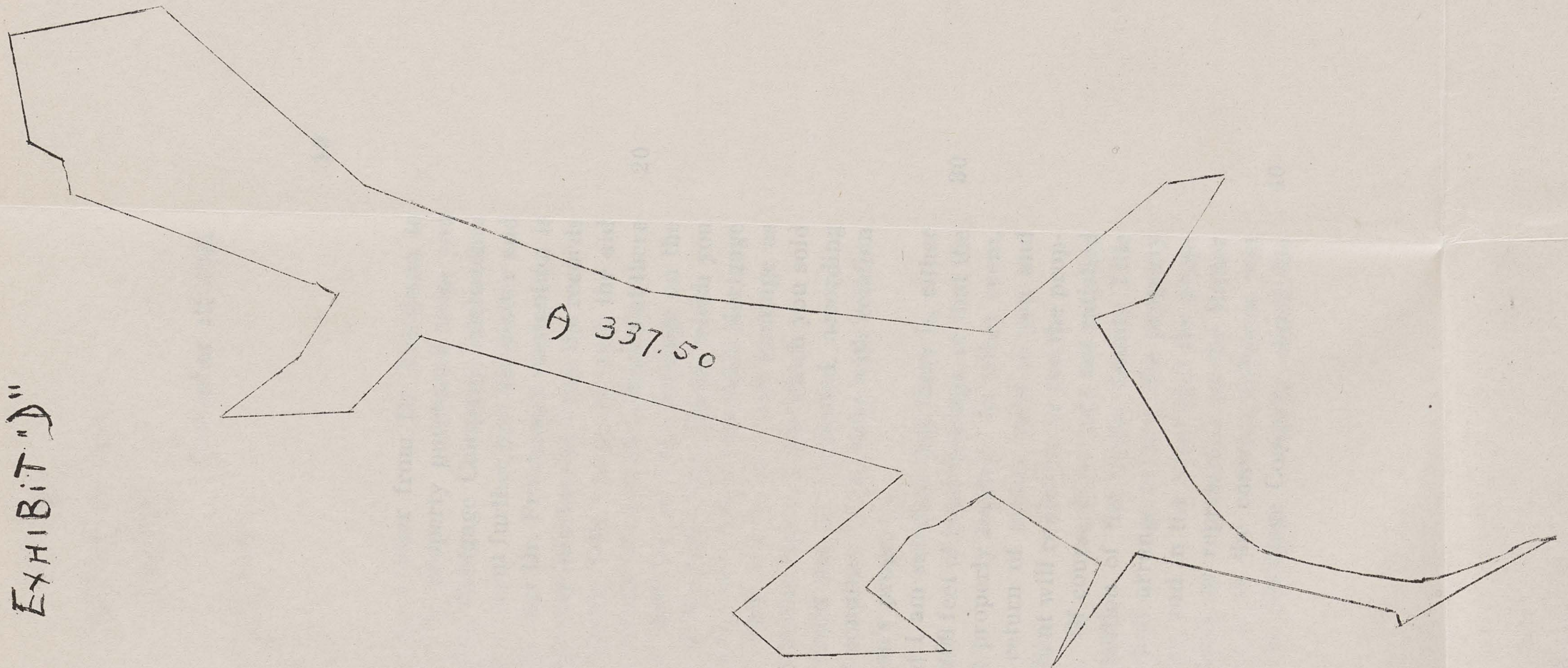




COPY OF MAP - MADE FROM INFORMATION CONTAINED IN DEEDS NOTED AND FROM DATA OBTAINED BY ACTUAL SURVEY MADE BY MY DIRECTION

Roy J. [signature]

DEC. 31, 1926



MADE FROM RECORDS ON FILE
AT THE SURVEYOR GENERAL'S
OFFICE AT BURLINGTON, N.J.

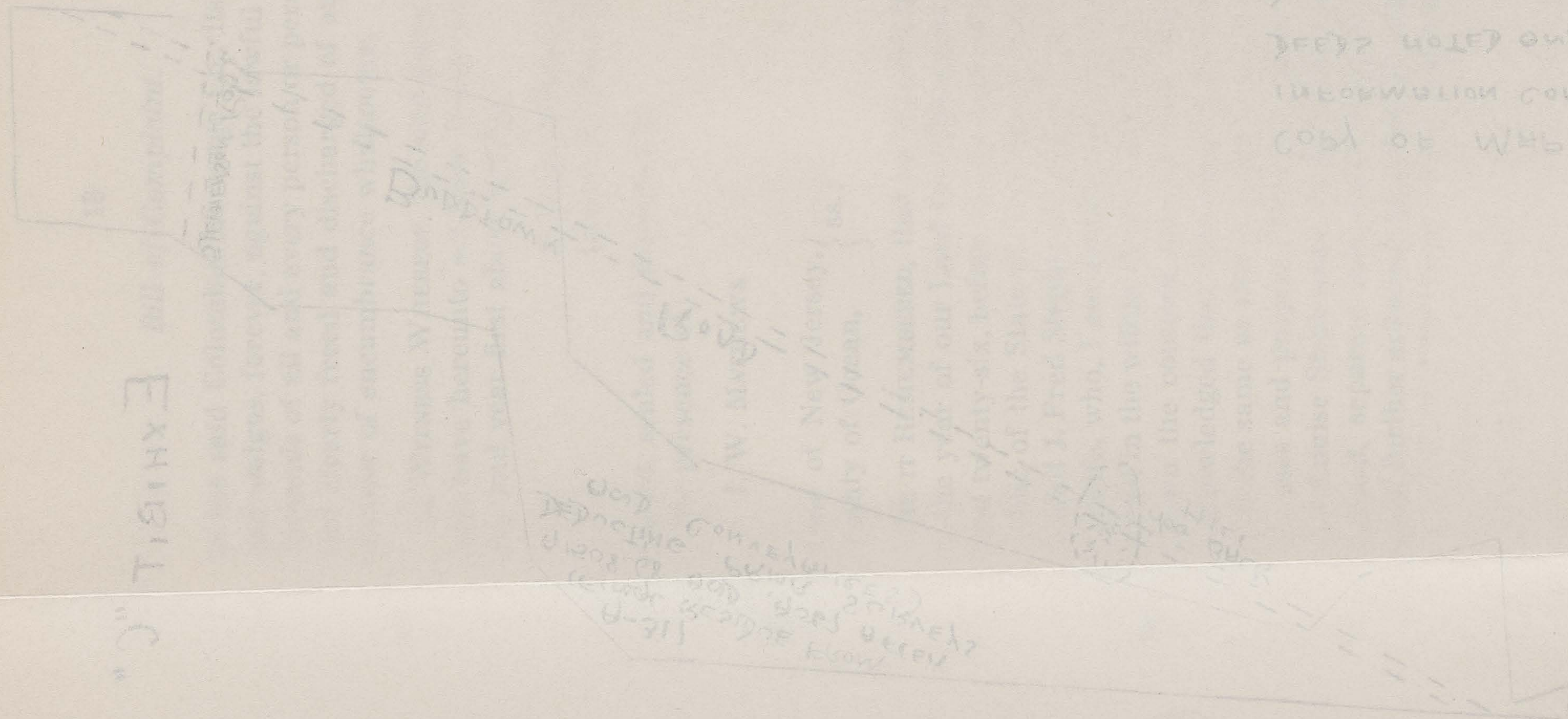
ROY THEODORE HAVENS
ENGINEER and SURVEYOR
POINT PLEASANT BEACH
DATE - 8-25-27
SCALE 1" = 320'
SURVEY - J. B.
DR. - J. H. Ch.
H-32

April 19 - 1828

MAP OF JOSHUA P. BROWNINGS - 4309.50 A
EXCEPTIONS 3972 A

REMAINS 337.50

JAMES BATTEN - D. SUR



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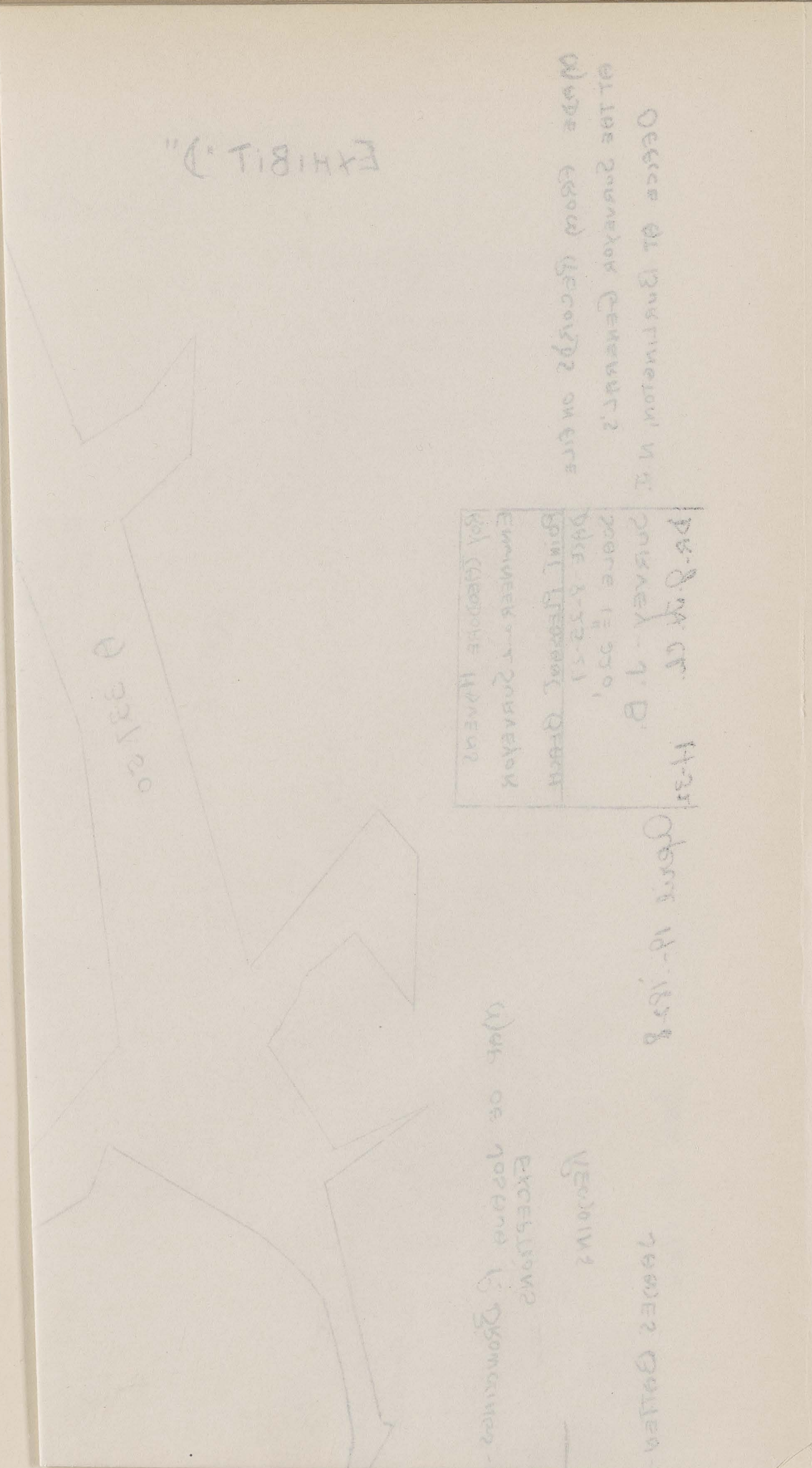

EXHIBIT "E."

November 12, 1926

J. Fred Stephenson, Esq.
321—6th St.
Lakewood, N. J.

Dear Sir:—

After receiving a letter from Dr. Friedman to the effect that the property purchased from you by the Columbia Mortgage Company, encroaches on his property, I went further into the matter and satisfied myself that Dr. Friedman's contention is correct. I gained my information from the records in the Ocean County Title Company, with the aid of Mr. Havens, the surveyor, to the effect that there is a shortage of 2100 feet of road frontage on the southerly side of the Budd Town Road, which you purported to have conveyed to Columbia Mortgage Company. In other words, the road frontage as appears on the Rutter survey from which you sold the property, could not be reconciled, according to the physical condition of the land with relation to Dr. Friedman's property.

I repeat, that I am satisfied that there is, either a shortage of 2100 feet of road frontage, or that the property is not properly located. In either event, we desire the return of money paid to you and in return, my client will re-deliver to you the property status quo. Of course, if you are not satisfied with the information of the Ocean County Title Company, we shall arrange to have the property definitely located, and in the event that the property is not located, as represented in the Rutter survey, referred to in the contract between you and the Columbia Mortgage Company, dated the

twenty-third day of June, 1926, we will, in addition to the return of the money paid to you and interest, for the property, require the cost of the survey. We therefore hesitate to make the survey, feeling perhaps that this information is sufficient to satisfy you of our contention.

I leave it therefore to your good discretion, whether or not you desire my client to proceed with the survey, or whether you wish to return us the money paid to you with interest, so as to avoid any further expense, which ultimately you would have to bear, in the event that the property is not properly located.

However, if I do not hear from you within due course of mail, I shall, in the interest of my client, proceed to have the survey made and shall assume that you are not satisfied with the findings by Mr. Then and Mr. Havens, that there is a shortage of 2100 feet of Budd Town Road shortage.

Yours truly,

Joseph M. Alsofrom

JMA:R*

Notice of Motion to Dismiss Bill.

(Filed October 11, 1927.)

To the above named complainant and to Joseph M. Alsofrom, Esquire, its solicitor:

Take Notice that on Tuesday, October 11, next, at ten o'clock in the forenoon or as soon thereafter as the matter can be heard at the chancery chambers in the City of Newark, I shall apply to Vice-Chancellor Berry or to such other Vice-Chancellor as shall then and there be holding court for the Chancellor for an order dismissing the Bill of

Complaint filed by you herein and restraining the institution of any other suit in this court upon the contract between the parties mentioned in said bill. At the same time and place and in the event that the motion is granted, I shall apply for a counsel fee to be paid by the complainant.

The motion to dismiss the bill will be predicated upon the grounds that:

1. Upon the allegations set up in the bill, there is an adequate remedy at law.

2. The bill shows no equity nor state of facts over which this court can exercise any jurisdiction or afford any relief.

3. The prayer of the bill is ambiguous in relation to the specific equitable remedy which complainant seeks.

4. That the prayer of the bill (particularly paragraph 3 thereof) is for a form of relief which this court cannot possibly grant.

5. The conduct of the complainant in relation to the premises as described in the bill precludes the intercession of this court in affording it any relief in that it has removed the possibility of restoring defendants to their position *status quo ante*.

I. B. Glueckfield,
Solicitor for and of Counsel
with Defendants.

October 5, 1927.

(Filed October 25, 1927.)

1. BENJAMIN GLUECKFIELD, Esq., for the motion.

JOSEPH M. ALSOFROM, Contra.

10 BERRY, V.-C.:

This is a motion to strike out the bill of complaint on the ground that the bill does not state an equitable cause of action and that there is an adequate remedy at law. The facts appearing from the bill and schedules attached thereto are as follows:

The defendants agreed to convey to the complainant two certain tracts of land as shown on a
20 certain map, for a consideration of approximately $11,000, part cash and part mortgage, with a provision tnat in the event that all cash was paid at settlement, the purchase price would be reduced to approximately $9,000. Settlement was made on the latter basis on the day fixed in the contract of sale and conveyance was made by description taken from said map and a warranty deed was delivered. Some time later complainant discovered that the defendants did not have complete
30 title to all the land conveyed and that the map referred to incorrectly located and described said lands. Thereupon complainant wrote a letter to defendants suggesting a reconveyance and the return of the purchase price. There is nothing in the bill indicating any action by defendants with reference to that letter, except that a refusal to comply with its suggestion may be inferred. Notwithstanding the letter, the complainant, according to the allegations of the bill, thereafter retained
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possession of the lands to which the defendant actually had title and sold a considerable portion of them. Complainant still has possession of these lands except the portion sold. There is no shortage of acreage, according to the bill, but the land was mislocated by the map. The complainant 10 seeks by this bill to have the court decree that the defendants pay to complainant such sum of money as represents the difference in the value of the land received and that which the defendant contracted to convey, and also a decree that the complainant has good title to the lands of which it is in possession, which is not disputed by anyone so far as appears from the bill. The bill does not seek a rescission of the contract nor does it offer to reconvey the lands received, which obviously it could not do. 20 Complainant has put it out of its power to restore the *status quo ante*. There is no doubt in my mind that upon a timely application and providing complainant had held itself ready, willing and able to do so, the contract could have been rescinded and the parties restored to their former possession. It is too late to do so now. The complainant's remedy, if any, is in a court of law and that remedy would appear to be adequate under the circumstances. 30

Reference has been made in the argument on this motion to a former bill of complaint between the same parties, dismissed without prejudice on motion of counsel for complainant. Copy of this bill of complaint was submitted to me with the briefs on this motion. I am not concerned with the former bill and have not examined it.

I will advise a decree striking out the complainant's bill. 40

Decided October 20, 1927.

MAJA LEON BERRY,
V.-C.

Notice of Motion for Leave to Amend Bill.

(Filed December 19, 1927.)

To I. Benjamin Glueckfield, Esq., Solicitor of Defendants, Military Park Building, Newark, N. J.:

10 TAKE NOTICE that on the 1st day of November, 1927, at ten o'clock in the forenoon of that day or as soon thereafter as the matter can be heard, at the Chancery Chambers, 1060 Broad Street, Newark, N. J., I shall apply to Vice-Chancellor Berry for an order dismissing the bill with leave to file an amended bill, or such other relief as the Court may deem just and equitable in the premises.

JOSEPH M. ALSOFROM,
20 Solicitor of Complainant.

Decree to Dismiss Bill.

(Filed November 19, 1927.)

This matter being opened to the Court by I. B. Glueckfield, solictor for and of counsel with defendants, and it appearing that due notice has been given to the complainant of this application and the Court, having heard the arguments of
30 counsel and having arrived at its decision that defendants' application should be granted;

It is thereupon on this first day of November, 1927, on motion of I. B. Glueckfield, solicitor for complainant, ordered that the Bill of Complaint filed herein be and it is hereby dismissed with costs to be paid by the complainant.

And it is further ordered that the complainant

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do pay to the solicitor of the defendants the sum of One Hundred Dollars as counsel fee.

Respectfully advised,

E. R. WALKER,
C. 10

MAJA LEON BERRY,
V.-C.

Order Denying Motion to Amend Bill.

(Filed November 22, 1927.)

This matter being opened to the Court by Joseph M. Alsofrom, solicitor for and of counsel with complainant, and it appearing that due notice has been given to the defendants of this application 20 and the Court, having heard the arguments of counsel and having arrived at its decision that complainant's application should be denied;

It is on this 22nd day of November, 1927, ordered that motion for leave to amend complainant's bill be and the same is hereby denied, and

It is further ordered that the above order shall take effect now as if it had been entered on the 1st day of November, 1927, which was the day it 30 was denied.

Respectfully advised,

E. R. WALKER,
C.

MAJA LEON BERRY,
V.-C.

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70 FEB.T.1928

New Jersey Court of Errors and Appeals

COLUMBIA MORTGAGE CO., a corporation of New Jersey, *Complainant-Appellant,* *v.* J. FRED STEPHENSON and LOUISE STEPHENSON, *Defendants-Appellees.*	On Appeal from Court of Chancery.

BRIEF IN BEHALF OF THE APPELLANT.

Statement of the Case.

The defendants-appellees (hereinafter referred to as defendants) agreed to convey to complainant-appellant (hereinafter referred to as complainant), 654 acres of land as shown on Rutter's survey, which was annexed to the agreement (Bill, Exhibit A, p. 14, State of Case). Before execution of said agreement defendants took complainant upon the land and pointed out the exact physical location of same, reference being made to Rutter's survey (Exhibit A, *supra*); defendants by suggestion induced complainant to use a certain title company to report on the title. Time was made of the essence of the contract and thirty days was allowed between the time of the contract, for the examination of the record, and passing of title. Complainant paid $9,250.00 in cash and received a deed containing four warranties (Bill, Exhibit B, p. 15, State of Case), which warranties will be fully discussed in the argument. Shortly afterward complainant took possession and staked the said land, when it was informed by one Adolph

Friedman that he had a paramount title to said lands; thereupon complainant made a thorough investigation and discovered that title to what was known as Rutter's survey was never vested in defendants and therefore said defendants could not convey said lands to complainant; that what had been conveyed in said deed were two certain tracts of land (Bill, Exhibits C and D, p. 18, State of Case) so decidedly different in appearance and location and each tract is distant over one mile from each other, and thereupon complainant demanded the return of the moneys paid and offered to reconvey whatever title had been vested in complainant by reason of said conveyance (Bill, Exhibit B, p. 15, State of Case); that the defendants refused to return the sum paid and complainant was obliged to sell off part of the land in order to realize some cash which it needed to carry on its business. Complainant charges these acts were fraudulent and sues to recover for the difference in value between the land which the defendant agreed to convey (Rutter's survey, Bill, Exhibit A, p. 14, State of Case) and that which it actually conveyed (Bill, Exhibits C and D, p. 18, State of Case).

Defendants moved to strike out on the following grounds:

1. Upon the allegations set up in the bill, there is an adequate remedy at law.

2. The bill shows no equity nor state of facts over which this court can exercise any jurisdiction or afford any relief.

3. The prayer of the bill is ambiguous in relation to the specific equitable remedy which complainant seeks.

4. That the prayer of the bill (particularly paragraph 3 thereof) is for a form of relief which this court cannot possibly grant.

5. The conduct of the complainant in relation to the premises as described in the bill precludes the intercession of this court in affording any relief in that it has removed the possibility of restoring defendants to their position *status quo ante*.

The bill was thereupon dismissed by the Court below and complainant appeals on the following grounds: The Court of Equity had jurisdiction; because the remedy at law is inadequate, indefinite and uncertain; that the Court of Equity has inherent and general jurisdiction in cases of fraud; the Court of Equity will take jurisdiction in matters of fraud when it is doubtful whether the complainant may be relieved in the Court of law; and in that the Chancellor denied an order for leave to amend the bill of complaint.

BRIEF OF THE ARGUMENT.

I.

The Court erred in striking out complainant's bill, because the remedy at law is inadequate.

(a)

Complainant cannot sue on the contract at law. If the matter in controversy involved a sale of personalty instead of realty, it is well settled that an action at law could be founded. The complainant could either rescind the contract or keep the goods and sue for the difference in value and use the contract as and for the basis of his action; but because of the nature of the realty, the general rule is, to use the words as quoted by Mr. Justice CAMPBELL's opinion in *Merchants' & Traders' Developing Co., Inc.* v. *Mercer Realty Co.*, 99 N. J. Law, at page 446:

> "That the acceptance of a deed for land is to be deemed *prima facie* full execution of an executory agreement to convey, and thenceforth the agreement becomes void, and the rights of the parties are to be determined by the deed, not by the agreement."

(b)

Complainant cannot conveniently or adequately sue at law on the covenants contained in the deed.

An examination of the deed will disclose that the legal import of the covenants contained therein is that they warrant the title to the land as described, namely, Exhibits C and D, page 18, State of Case. While mention is made of Rutter's survey, defendants could not convey said lands as they did not own same, even though the deed colored a conveyance of Rutter's survey. The fact is, that the deed by reference and recital conveyed lands as described in Exhibit C and D, page 18 of State of Case, being the only lands which defendants owned and which by mesne conveyances had acquired title to same, and which is described in said deed (Exhibit B, p. 15, State of Case), as a residue of lands returned to one Browning in an early grant. Therefore, by analysis and deduction the conclusion is that the deed (Exhibit B, p. 15, State of Case), imports the conveyance and which complainant alleges are lands as shown in Exhibits C and D, page 18, State of Case.

Now then, in an action at law by complainant against defendants for breach of warranty, the defendants could meet the situation by showing there is no breach of warranty in so far as the warranties are not broken with relation to premises described as Exhibits C and D, *supra*. The Court of law cannot go behind the deed to determine what was actually intended to be conveyed and therefore complainant could not maintain an action on the covenants.

In the case of *Dawson* v. *Leschziner*, 72 N. J. Eq. 1, there appears analogous situation. Complainant was the owner of real estate and employed defendant to sell same for $5,500.00. Defendant notified complainant of an offer of $5,000.00. Thereafter complainant agreed to sell her property for $5,062.00 which she was assured by defendant was the best price obtainable. Afterwards the deed for said property was executed to one Sutor, and since that time complainant discovered that Sutor, instead of paying $5,062.00 actually paid $5,500.00. The bill prayed for return of the money which defendants received over and above $5,062.00. The Court said, on page 3:

> "The first (ground) and the one principally argued is *that the complainant has adequate relief at law, and may there recover the amount which she now seeks to have decreed to be paid to her. This court has a general jurisdiction in cases of fraud, as well as in cases where the remedy at law is plainly adequate and complete,* as in other cases."

and further goes on to say:

> "In the case now before us, the defendants have received from a third party money which in equity ought to go to the complainant. In an action at law to recover that money, the complainant would be met with a defense founded upon her written agreement to convey the property for the sum of $5,062.00 and with the fact that she had afterward executed and delivered a deed for the property to the purchaser at that price, so that, without deciding that no action at law would lie, it at least is not clear that that action would be complete and adequate to relieve the complainant."

and goes on to say further, on page 4:

> "And considering the fact that it may be doubtful whether the principal may be relieved in a court of law, the Court of Chancery

should maintain its jurisdiction to enforce proper relief. The bill is not objectionable on that ground."

(c)

Complainant cannot conveniently or adequately sue in an action at law on fraud because scienter which is one of the most important elements at law, is equally most difficult and therefore follows most inconvenient to prove, especially in the case at bar.

In *Commercial Casualty Insurance Company, et als.*, v. *Southern Surety Co. of Des Moines, Iowa*, 135 Atl. Rep. 511, the matter was argued on a motion to strike out the bill on the ground of jurisdiction and Vice Chancellor Backes, speaking for the Court says on page 513:

> "The bill is presented on the theory that, although the complainants may have a remedy at law, they are at liberty to come into equity, because of its original jurisdiction over all matters of fraud, and because their defense of fraudulent procurement rests in proof which is sufficient in equity only to overthrow the contracts sued on at law, viz. that the representation as to the financial worth of John A. Bell was untruthful, but not deceitful."
>
> "Inherently, equity has jurisdiction in all cases of fraud. But its doors have not been as freely open to all manner of fraud since the law courts have taken upon themselves to grant relief in some cases of fraud. When the primary right is legal, as it is here, and the jurisdiction of the law courts is concurrent, and if the remedy at law is adequate, certain and complete equity remains passive. Equity remains inactive only in that class of fraud that is recognized and remediable at law. A misrepresentation without intent to deceive will not sustain an action at law for deceit, while in equity an untruthful representation of a material fact, though there be no moral delinquency, is deemed to be fraudulent. Eibel *v.* Von Fell, 55 N. J. Eq. 670, 38 A. 201; Straus *v.* Norris, 77 N. J. Eq. 33, 75 A. 980; Cowley *v.* Smyth, 46 N. J. Law 380, 50 Am. Rep. 432. The law courts not having as yet taken upon themselves to relieve against wrongs resulting from misrepresentations fraudulent in conscience only, courts of equity continue to perform that function."

And goes on to say further:

> "But the complainants are not reduced to the single and narrow ground assigned in their bill in maintaining their suit in this court. The concurrent jurisdiction of the law courts to relieve against deceitful representations does not abridge equity's jurisdiction to grant relief on that score, and, even though it be, as contended, that the bill discloses that all the misrepresentations were deceitfully made, it may be that the complainants would not be able to prove that the misrepresentations were knowingly false, but could only prove that they were material and untrue a defense in equity only. The complainants are not to be put to the hazard at law when the requirements in equity are less exacting. In Schoenfeld *v.* Winter, 76 N. J. Eq. 511, 74 A. 975, on demurrer to a bill to rescind a contract on the ground of deceitful misrepresentation and to restrain an action at law in *assumpsit* arising out of the contract.
>
> "Vice Chancellor Howell overruled the demurrer, holding that:
>
> > " 'While the bill sets out a common-law action for deceit, this does not interfere with the jurisdiction of equity. In order to set aside a contract founded in fraud, it is only necessary in equity to prove that the representation upon which the action is founded is false, that it is material, and that damage has ensued; while at the common law the proof must go to the extent of satisfying the jury that the defendant knew that the statement relied upon was false. It will there-

> fore be seen at a glance that the remedy in equity is much broader and much more efficient than the remedy at law could be. It was held in Morse *v.* Nicholson, 55 N. J. Eq. (10 Dick.) 705, that in a case where the jurisdiction of the courts of law and equity for the redress of frauds was concurrent, the court of equity should entertain the cause, and determine it upon its merits, provided that adequate relief could not be obtained at law; and this, I take it, is a general rule which ought to be applied in the discretion of the court of cases of fraud where there are concurrent remedies.' "

In the case at bar if the complainant could sufficiently establish at law that at the time of the agreement and the conveyance that the defendants knew that the title to land commonly known as Rutter's survey, *supra,* was not vested in them, complainant would have little difficulty in establishing its case at law, but to use the words of the learned Vice-Chancellor, that statement is untruthful, if not deceitful, and it may be said that in equity and in conscience the defendants should have known what they conveyed because they had made a material representation at the time of the conveyance and the agreement that they conveyed certain lands which they did not in fact, nor at law, own. In equity it can be shown that the statements of the defendants with reference to the land which they represented were material are untrue, also the refusal on the part of the defendants to return the moneys paid when demanded and damage resulting—all of these facts in equity spell fraud. It is obvious therefore that those facts and circumstances are more conveniently and adequately proved in the Court of Chancery and therefore the Court of Chancery should maintain its jurisdiction in the case at bar.

II.

The Court erred in striking out complainant's bill, because the Court of Equity has a general and inherent jurisdiction in all matters of fraud.

Query. Whether the Court will exercise its jurisdiction depends upon the nature of the case.

The Court of Chancery in this State possesses a general jurisdiction in cases of fraud as well as in cases where the remedy at law is plain, adequate and complete. In the case of *Anderson* v. *Eggers,* 63 N. J. Eq. 264, the Court of Errors, quoting Lord Eldon, on page 269, says:

> "If there is a jurisdiction at law in such cases, there is also a jurisdiction in equity."

And further says, on pages 270 and 271:

> "The jurisdiction is fully recognized by writers on equity jurisprudence. This, 1 Story, Eq. Jur. 195: 'With the exception of wills, the court of equity may be said to possess a general and perhaps a universal concurrent jurisdiction with courts of law in cases of fraud cognizable in the latter, and exclusive jurisdiction in cases of fraud beyond the reach of the courts of law. The jurisdiction in matters of fraud is probably coeval with the existence of the Court of Chancery.' "

Then, the Court comes to this conclusion on page 271:

> "The only question, therefore, presented to an English court is, not whether the equitable jurisdiction exists, but whether it should be exercised.
>
> "But New Jersey is distinguished from her sister states by her adherence to the standards of the mother country respecting both rights and remedies in equity, and I know of no constitutional or statutory provision or judicial decision in this state which can be regarded as withholding or withdrawing from

our court of chancery any jurisdiction possessed by its English prototypes.

"When resorted to, however, the jurisdiction of equity has not been doubted. Thus, in Winans *v.* Winans, 19 N. J. Eq. 220, where the complainant claimed that the defendant, by fraudulent representations concerning the incumbrances on land sold by the complainant to the defendant, had induced the former to refrain from demanding before conveyance a part of the price agreed upon, and the prayer was that the defendant should be decreed to pay the money thus fraudulently retained, the cause was argued by the present Chancellor for the complainant and by a former Chancellor for the defendant, without question as to the jurisdiction and a decree for the complainant was put by Chancellor ZABRISKIE distinctly on the ground of fraud in the nonpayment of the price, and was to the effect that the defendant should pay the same."

The cases of *Dawson* v. *Leschziner* and *Anderson* v. *Eggers*, above cited, precludes us from any doubt as to whether the Court has jurisdiction in matters of this kind, but the question is, will the Court take jurisdiction, and the answer is, the Court will take jurisdiction if the remedy at law is uncertain, incomplete and indefinite, as has already been set out, *supra.*

The case of *Commercial Casualty Insurance Co.* v. *Southern Surety Co.*, above cited, may well be used as authority to support this contention as well.

III.

The Court erred in striking out complainant's bill, in that it should have allowed complainant leave to amend.

In amending the bill, complainant can take the position that the land marked Exhibit C, page 18,

state of case, to a certain degree may, more or less, conform to what is known as Rutter's survey, *supra,* and rescind as to tract marked Exhibit D, page 18, state of case, and contend that there is a deficiency for the balance of the acreage and sue for the deficiency thereof. Since Exhibit D cannot be reconciled as being the property in conjunction with Exhibit C in that it is one and one-half miles distant from Exhibit C and therefore not contiguous as appears by Rutter's survey (Exhibit A, p. 14, State of Case).

In the case of *Cartun* v. *Myers*, 82 Atl. Rep. 14, the Court says:

> "Where in a sale by the acre there is a substantial deficiency in the acreage, and the vendor executing a deed, and the purchaser giving back a purchase money mortgage, merely made a mistake in determining the quantity of land, there is a failure of consideration of the mortgage to the amount of the deficiency, and the purchaser is as against the vendor entitled to a reduction of the mortgage debt to that amount."

In *Cartun* v. *Myers* the complainant tried to procure a credit upon a purchase money mortgage made by them on the ground of a deficiency in the land conveyed, it will be observed that the Court took jurisdiction in the matter but could not afford the relief prayed for because the mortgage got into the hands of an innocent third party (action was brought twenty years after the consummation of the transaction.

Therefore the complainant ought to be allowed to so amend its bill of complaint to conform to the case of *Cartun* v. *Myers.*

IV.

Points Three, Four and Five, of counsel for defendants' argument are disposed of by the 60th Chancery Rule, which says:

> "Relief other than that prayed for may be given (without prayer for general relief) to the same extent as if general or other relief had been prayed for."

besides there is a general prayer for relief in the bill and further, in the case of *Rau* v. *Doremus*, 139 Atl. Rep. (recently reported), it was held that the bill should not be dismissed on motion if it presents a case for any relief.

In conclusion therefore, it appears to me from the foregoing facts that the remedy at law is inadequate, uncertain and indefinite and that the court of equity has that inherent jurisdiction handed down to it by tradition when the complainant was aggrieved and yet could not find relief in the court at law because of its inflexibility and universality is deficient and therefore sought the scepter of the throne for assistance and that the case at bar is one of a class which gave rise to the birth of the Court of Chancery.

I therefore respectfully submit that for the reasons above cited the decision of the Court below should be reversed.

Joseph M. Alsofrom,
Solicitor for and of Counsel
with Complainant-Appellant.

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70 FEB.1.1928

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New Jersey Court of Errors and Appeals

Columbia Mortgage Co., a corporation of New Jersey, *Complainant-Appellant*, *vs.* J. Fred Stephenson and Louise Stephenson, *Defendants-Appellees.*	*On Appeal from Court of Chancery.*

BRIEF OF DEFENDANTS-APPELLEES.

I.

The facts as set forth in the brief of the complainant-appellant are substantially as alleged by the bill of complaint filed by it, from the decree dismissing which bill this appeal is taken. However, two main facts set forth by the bill are not stated by this brief, namely, first that the complainant accepted the conveyance and paid for it after being given notice by the Title Company that there was some question as to the accuracy or correctness of the survey; and secondly that, having taken title in July, it was not until November that it communicated with the defendants in an effort to straighten out the alleged difficulty with the land.

The defendants contend that, having notice of the alleged inaccuracy of the survey, it was the duty of the complainant to have examination into it before accepting the conveyance, and not having done so it must be presumed that complainant waved any and all rights it may have had to rescind the agreement upon this ground. Furthermore it is respectfully urged that the delay of more than four months in notifying

the defendants of the circumstances renders the complainant guilty of laches and should bar its recovery.

Complainant's first ground of appeal is that the Court erred in striking out the bill because the remedy at law is inadequate.

(a)

To support this contention, complainant urges that the contract to sell became merged in the deed upon the delivery thereof. The complainant overlooks the fact that it is not suing on the contract at all but is suing in avoidance of the contract and certainly cannot be bound by the rule of law as set forth in his brief on this point. In the case of *Martin* v. *Baldwin,* 100 Atl. 217, it was held that an action for fraud and deceit would lie after the execution and delivery of the deed.

(b)

Complainant contends that because it would be difficult for it to prove its case at law, therefore the Court of Chancery should take jurisdiction because of its general jurisdiction in fraud cases. If the Court of Chancery were to take this attitude, it would result in the complete and immediate discontinuance of all actions at law based upon fraud and deceit. Such actions at law have been intentionally made difficult due to the feeling of the courts that an allegation of fraud is such an allegation as should require clear and convincing proof to support it. The Court of Chancery should not and will not take jurisdiction of any suit for money damages, particularly if such damages are unliquidated and must be assessed, unless there is some other

very strong and good reason why it should, particularly if the jurisdiction of the Court is challenged *in limine.*

Where the suit is purely for damages in an unliquidated amount, such cases cannot conveniently be tried in Chancery, and, upon motion, may be dismissed. *Rosenberg* v. *Century-Plainfield Tire Co.,* 110 Atl. 516.

All of the cases cited by complainant in support of its contention involve some special ground for equitable jurisdiction or some special prayer for a relief which the courts of law cannot grant. The case of *Dawson* v. *Leschziner,* 72 N. J. Eq. (on page 5 of complainant's brief) involved a suit for the return of a specific liquidated sum of money from the defendant, the complainant's broker, which sum of money represented a secret profit made by that broker; a case involving a fiduciary relationship and therefore of course cognizable by the Court of Chancery.

In the case of *Commercial Casualty Insurance Co.* v. *Southern Surety Co.,* 135 Atl. 511 (page 6 of complainant's brief) a bill was filed praying for the rescission and cancellation of an insurance policy, a remedy obtainable solely in the Court of Chancery. The case *Eibel* v. *Von Fell,* 55 N. J. Eq. 670; 38 Atl. 201 (complainant's brief, page 7), later to be discussed at greater length, also involved a suit for a rescission of a contract to sell and for cancellation of a deed.

In the case of *Strauss* v. *Norris,* 77 N. J. Eq. 33; 85 Atl. 980 (complainant's brief, page 7) the complainant instituted a suit in the nature of a bill for reformation of a contract, alleging that he received considerably less land than was represented, and praying for a return of part of the purchase price. The Court of Chancery

in that case took jurisdiction not only because of the fraud, but also because of the fact that there was, in addition, a special basis of equitable jurisdiction—the prayer for reformation.

In the instant case, the prayer is only for money damages—unliquidated, in the bargain. There is also included a prayer that the complainant be decreed to have good title to the premises conveyed, but this, as was said by the Vice-Chancellor in his opinion, has never been disputed, and cannot be put in issue in this manner.

Counsel for complainant, on page 7 of his brief, has graciously quoted at length from the case of *Schoenfeld* v. *Winter,* 76 N. J. Eq. 511; 74 Atl. 975. However, it is respectfully submitted that no case can be cited more properly in support of the contention of the defendants than can this one. The Court in its opinion, said

> "There is, however, a limitation upon this doctrine which is found in the case of Krueger *v.* Armitage, 58 N. J. Eq. 357, 44 Atl. 167; and in Polhemus *v.* Holland Trust Company, 59 N. J. Eq. 93, 45 Atl. 534, affirmed 61 N. J. Eq. 654, 47 Atl. 417. In Krueger *v.* Armitage, the complainant filed his bill to recover damages accruing out of what was claimed to be a fraudulent sale of stock. There does not appear to have been any prayer for the rescission of the contract which possibly differentiates the case from the one in hand. The report shows that it was merely a bill for damages based upon a false representation of fact, there being no equitable remedy appealed to except the recovery of damages. Vice-Chancellor Emery held that in that case the jurisdiction should not be exercised because it had been challenged *in limine,* and that the assessment of damages could be made by a jury as well as by this Court. In Pólhemus *v.* Holland Trust Company a transferee of bonds issued by a foreign corporation attempted to recover in equity the amount paid by him for the transfer upon the sole ground that the sale was fraudulent, and therefore the complainant had the right to rescind the transaction and recover back his money; and Vice-Chancellor Reed held that the recovery of money paid by the inducement of false representations was not within the scope of modern equity jurisdiction. These cases were approved by the Court of Errors and Appeals in Polhemus *v.* Holland Trust Company, 61 N. J. Eq. 654, 47 Atl. 417. In these two cases it will be observed that there was no ground of equity jurisdiction except the false representation of fact."

The cases of *Krueger* v. *Armitage,* 44 Atl. 167, 58 N. J. Eq. 357, and *Polhemus* v. *Holland Trust* Co., 59 N. J. Eq. 93, 45 Atl. 534, affirmed as to this point in 61 N. J. Eq. 654, 47 Atl. 417, are the outstanding authorities for the proposition that the recovery of money paid by the inducement of false representations is not within the scope of modern equity jurisdiction. The complainant would contend that if A were fraudulently induced to purchase worthless stock certificates from B, an utter stranger, A could sue in the Court of Chancery for a return of his money. This, it is respectfully submitted, is not at all the nature of the cases which are within the scope of the jurisdiction of the Court of Chancery and to extend the jurisdiction thus far would be to open the door to innumerable actions which rightfully are in the province of the courts of law alone. The mere difficulty of proving one's case should not be and is not the test of whether there is an adequate remedy at law.

II.

Complainant's second ground is that the Court of equity has a general and inherent jurisdiction in all matters of fraud. This, and the first ground of appeal are more or less identical and should have been argued together.

Complainant cites in support of its contention the case of *Anderson* v. *Eggers,* 63 N. J. Eq. 264, 49 Atl. 578. The Court in this case however, cited with approval the case of *Krueger* v. *Armitage, supra,* and *Polhemus* v. *Trust Co., supra,* but distinguished these cases on the ground that there the jurisdiction of the Court had been challenged *in limine*—which the defendants in this case did by virtue of their motion to strike out the bill of complaint. Furthermore that suit was one in the nature of a bill for specific performance of a contract, and the Court held that, the jurisdiction not having been challenged or its exercise objected to, the Court would therefore exercise it.

It is respectfully submitted, that in the case at bar, the jurisdiction of the Court of Chancery having been challenged and the Chancellor having declined to exercise jurisdiction over the matter, the ruling of the Chancellor should not be disturbed.

III.

Complainant contends that the Court erred in refusing a motion to amend complainant's bill, said motion having been filed after the filing of the decree dismissing the bill of complaint.

Leave to amend, except as laid down by the rules of the Court of Chancery, is always subject to the discretion of the Court and, except

in cases governed by those rules the Court may in its discretion refuse such leave after the defendant has entered his appearance.

No rule of the Court permits a complainant to amend his bill as of course, in a case of this sort. In the case of *Hardin* v. *Boyd,* 113 U. S. 756, at p. 761, it was said that though amendments should be liberally allowed in the courts of equity, "an amendment should rarely, if ever, be permitted where it would materially change the very substance of the case made by the bill."

Here, the complainant desires to amend so as to ask for rescission as to part of the land sold and reformation as to the balance, whereas his bill now prays only for money damages.

An amendment cannot or should not be allowed after the cause is at issue, *Codington* v. *Mott,* 14 N. J. Eq. 430. Here the cause not only was at issue, but had been finally decided before the complainant made its motion for an amendment.

As to complainant's argument on the case of *Cartun* v. *Myers,* 82 Atl. 14 (page 11 of complainant's brief) it is true, that where there is a mistake as to the amount of acreage conveyed, a suit in the nature of a bill for reformation may be instituted to recover back part of the purchase price. Here, however, there is no possible mistake as to the amount of acreage conveyed; it is the exact amount contracted to be conveyed, and the complainant admits that it took the premises knowing that there was a mistake in the survey. Nevertheless it asks that this court permit it to return part of the land and then demand a return of part of the purchase price on the ground that it did not get as much as it contracted for. It desires to re-

scind the contract in part and affirm in part. This, of course, cannot be done. In order to receive equity one must do equity; in order to rescind a contract one must tender a return of all the proceeds thereof. Here, complainant by its own admission voluntarily placed itself in a position where it is unable to do this. By its own admission it has conveyed perhaps the major portion of the most valuable of the land it received, and now desires to get rid of the part of lesser value. It has ratified the entire contract by exercising unquestioned dominion over the land; it has placed itself in a position which makes it impossible to restore the defendants to the *status quo ante.*

In the case of *Trenton Pass. Ry. Co.* v. *Wilson,* 56 N. J. Eq. 783; 40 Atl. 597, the Vice-Chancellor below allowed the recovery of cash paid, through fraud, for land, without requiring the return of the land received. The decree was reversed by this Court on the ground that one cannot seek equity without doing equity; in order to receive back the money paid the complainant must tender a return of the property. In *Green* v. *Stone,* 54 N. J. Eq. 387; 39 Atl. 1099, at page 1102, the Court said:

> "A court of equity may rescind a contract for a mistake which is unilateral * * * in such a case the *whole contract* (italics ours) is set aside and the parties restored to their original position."

On page 5 of complainant's brief, it cites the case of *Eibel* v. *Von Fell, supra.* This was a suit for a rescission of a contract and a cancellation of a deed brought some time after the complainant received knowledge of the mis-representation, and, notwithstanding this knowledge, made certain repairs, rented and generally ex-

ercised dominion over the premises. The Court denied the prayer for rescission and remitted the complainants to their action at law because of this ratification of the contract. In the case at bar, not only did the complainant delay in demanding a return of its money, not only did it exercise general dominion over the premises, but it also actually ratified the contract by selling part of the land obtained under a contract which it now seeks to rescind in part.

It is, therefore, respectfully submitted, upon the part of the defendants-appellees that:

(1) Because of the unreasonable delay upon the part of the complainant;

(2) Because of its exercise of dominion over the premises and its inability to restore the defendants to their original possession;

(3) Because it prays only for money damages as a result of which the Court of Chancery, its jurisdiction having been challenged, refused to take jurisdiction of the case;

(4) And because the Court of Chancery properly exercised its discretion in refusing leave to amend the bill of complaint at that late date;

The appeal should be dismissed with costs and counsel fee to abide the order of the Court.

Respectfully submitted,

PARSONNET & FRUCHTMAN,
Of Counsel with Defendants-Appellees.