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TESTIMONY.

For Complainant.

For Defendant.

EXHIBITS.

BILL OF COMPLAINT.

In Chancery of New Jersey

To His Honor Edwin Robert Walker, Chancellor of the State of New Jersey.

The complainant, Journal Plaza Holding Co., a corporation of the State of New Jersey, having its principal place of business in the City of Jersey City, in the County of Hudson and State of New Jersey, complaining of the defendant, J. L. H. Company, Incorporated, a New Jersey Corporation says:

1. That on or about September 25, 1925 and for a long time prior thereto the defendant was and still is the owner in fee simple of the premises situated on the southeast corner of Hudson Boulevard and Pavonia avenue in the City of Jersey City, County of Hudson and State of New Jersey and which are more particularly described as follows:

> "All those two certain lots, tracts or parcels of land and premises, situate, lying and being in the City of Jersey City, which upon a certain map entitled 'Map of property formerly the Tonnele Homestead, Hudson County, New Jersey, belonging to Robert C. Bacot, 1864,' filed in the Office of the Clerk (now Register) of Hudson County, May 13, 1864, are known, laid down and designated as Lots numbers one hundred and two (102) and one hundred and three (103), fronting on the southerly side of Pavonia Avenue (formerly Prospect Avenue), each of said lots being twenty-five (25)

feet wide in front and rear and one hundred and twenty-five (125) feet deep throughout."

2. That on September 25, 1925 the defendant, as lessor entered into a written agreement of lease with Matthew J. Makaus as tenant, wherein and whereby the said defendant did demise and let unto the said Matthew J. Makaus, the premises described in paragraph No. 1, consisting of a vacant plot of ground together with the appurtenances and the sole and uninterrupted use and occupation thereof, except as in said lease provided for a term of years expiring on September 30, 1950 upon the terms and conditions set out in said lease, a copy of which is hereto annexed and made a part hereof and is hereby expressly referred to as if herein set forth fully and at length.

3. That by mesne assignments, the last of which is dated July 10, 1928, a copy of which is hereto annexed and made part hereof and is hereby expressly referred to as if herein set forth fully and at length, the said lease was assigned, set over and transferred unto the complainant which is now the owner and holder of said lease and in possession of the premises described therein under and by virtue of said written indenture of lease.

4. That upon the premises which consisted of vacant lands, the complainant has erected a modern, substantial, three-story stone and steel construction stores and lofts building, at a cost to the said complainant in excess of $175,000.00 and there are now in the said building, eight retail stores on the ground floor, a restaurant on the second floor and a billiard academy on the third floor, the roof being leased for advertising purposes.

5. That among other things said lease referred to in paragraph No. 2 contains the following provisions:

> "That the said lessor shall permit the said lessee, his successors or assigns to raise cash to an extent not to exceed 2/3 of the value of the cost of said improvements, which money is to be secured by a bond and mortgage to be executed by the lessor, its successors or assigns and to be a lien upon the said demised premises and the buildings and improvements thereon. That said two-thirds of the cost of the said improvements is not to exceed the sum of $50,000.00; that the Bond and Mortgage shall remain a lien upon the said demised premises and the improvements erected thereon.
>
> "It is further agreed that the lessee shall pay all interest on the said mortgage so raised during the term of this lease or the term of the said bond and mortgage, said interest to be paid within 30 days from the due date. It is further agreed that the improvements so made on the said premises shall be the property of the lessor subject to this lease."

6. That under and pursuant to the provisions in said lease referred to in paragraph 5, the complainant was entitled to raise by mortgage loan the sum of $50,000.00 in cash and to have the premises described in paragraph No. 1, mortgaged by the defendant to the mortgagee as a lien and security for the repayment of said sum.

7. That pursuant to the said clauses referred to in paragraph No. 5, the complainant with the knowledge and approval of the defendant, ap-

plied to the Mutual Benefit Life Insurance Company of Newark for a mortgage loan of $50,000.00 upon the premises described in paragraph No. 1, and said loan of $50,000 was granted to the said complainant for a period of five years from its date, with interest at 5½ per cent. payable semi-annually, and thereupon the complainant presented and tendered to the defendant for proper execution by its proper officers a bond and mortgage for said amount in favor of the Mutual Benefit Life Insurance Company of Newark, New Jersey.

8. That the defendant, scheming, contriving and designing to cheat and defraud the complainant out of the benefits of its lease and with the avowed purpose and intent of compelling the complainant to abandon said premises and its valuable leasehold, and endeavoring to repossess itself of the premises, the value of which has greatly been enhanced by the complainant's erection of said building, has refused and still refuses to execute the bond and mortgage so presented and tendered to it by the complainant as herein above set forth, stating as its only reason for such refusal, that it, the defendant, is not bound to assume the payment of the principal of said mortgage and that although the said bond and mortgage are in respect to amount, time and in all other respects, satisfactory to the said defendant, yet the defendant maintains that it is entitled to a collateral agreement by the complainant that the complainant will pay and discharge the principal of said mortgage obligation all of which the complainant maintains is contrary to the written lease existing between the parties.

9. That said refusal on the part of the defendant to execute the said bond and mortgage of $50,000.00 is not bona fide and is a mere pretext to embarrass the complainant by straining its credit and to compel the complainant to abandon said premises as the defendant knew and now knows that the said commercial building, which with its large, income revenue, greatly enhances the defendant's interest in the fee simple, which prior to the erection of said building was vacant land with no revenue, was built upon the strength of the provisions in said lease that upon completion the defendant would at the request of the complainant, execute and deliver a bond and mortgage in the sum of $50,000.00.

10. That the complainant has expended a sum in excess of $175,000.00 in cash for the construction of said building, relying upon the said written lease that upon completion thereof it could obtain and have the defendant join in a mortgage not to exceed $50,000.00 upon the said premises, and that unless the complainant is enabled to obtain the mortgage loan of $50,000.00 in order to defray some of the outstanding bills for the construction of said building and in order to reduce its obligations to banks from which credit was obtained in order to erect said building relying upon the terms of said written lease, the complainant will be embarrassed and will be in danger of losing said premises and its equity therein, and without the intervention of this Court, the complainant will suffer irreparable injury and damage.

11. That the defendant in furtherance of its design to prevent the complainant from obtaining the benefit of the provisions of said lease referring to the execution by the defendant of the

bond and mortgage in the sum of $50,000.00, has threatened to do everything in its power to harrass the complainant and to so treat and deal with the property that a decree ordering the defendant to sign the bond and mortgage will be futile and valueless to the complainant.

12. That unless this Court intervenes and orders the defendant to specifically perform the terms and provisions of said lease, the complainant is in danger of losing its equity in said lease and the building erected upon said leasehold, in which event the complainant is fearful that without this Court's intervention the defendant's fraudulent scheme to oust the complainant of its valuable leasehold cannot be frustrated.

13. That unless a receiver is appointed by this Court to take charge of the premises mentioned and described in paragraph No. 1 herein, the defendant will carry out its threat to prevent the complainant from obtaining the benefit of the provisions in said lease referring to the bond and mortgage of $50,000.00 to be executed by the defendant and will encumber and convey away said premises and will do everything in its power to defeat the rights of the complainant in and to said property so as to render the real estate of diminished value and incapable of satisfying a decree of this Court and that said waste, misconduct and neglect will work irreparable injury to complainant.

That the complainant is without adequate relief in the Courts of Law and therefore prays:

1. That the defendant, J. L. H. Company, Incorporated, answer each and every allegation contained in the bill of complaint but without oath.

2. That the defendant may be decreed to specifically perform the provisions contained in the written lease referred to in paragraph No. 2.

3. That the defendant be decreed to execute and deliver to the Mutual Benefit Life Insurance Company of Newark or to such other mortgagee as the complainant may procure, its bond in the penal sum of $100,000.00 conditioned to pay the sum of $50,000.00 within five years from its date with interest at 5½ per cent., payable semi-annually together with the mortgage accompanying the same, to embrace premises described in paragraph No. 1.

4. That a writ of injunction issue out of and under the seal of this Honorable Court to be directed to the said defendant and enjoining and restraining it from disposing of said land and premises or encumbering the same or in anywise conveying said premises except by order and decree of this Honorable Court.

5. That the complainant may have such other and further relief in the premises as the nature of the case shall require and shall be agreeable to equity and the conscience.

6. That the defendant show cause why a receiver of said premises described in paragraph No. 1 herein, should not be appointed to take possession and control of aforesaid premises pending final hearing in this cause and conserve and preserve the same for the benefit of all parties to this litigation, said receiver to be clothed with all powers incident to his office pursuant to statutes of the State of New Jersey in such case made and provided.

May it please your Honor, the premises considered, to grant not only the State's writ of injunction issuing out of and under the seal of this Honorable Court to be directed to said defendant, J. L. H. Company, Incorporated, restraining it from doing any matter or thing that will in any manner diminish the value of aforesaid premises or in any way destroy, damage or waste the same or from selling, mortgaging or in anywise disposing of or encumbracing said real estate in any manner or form whatsoever, but also the State's writ of subpoena issuing out of and under the seal of this Honorable Court to be directed to the defendant, J. L. H. Company, Incorporated, commanding it by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Court, then and there to answer all and singular the said premises and to stand to, abide by and perform such order and decree as to your Honor shall seem meet and shall be agreeable to equity and the conscience.

And the complainant will ever pray, etc.

JACOB L. NEWMAN,
Solicitor for and of Counsel with the Complainant.

Dated April 19, 1929.

Annexed to the bill of complaint are Exhibits C. 1 and C. 4 printed on pages 83 and 98.

ANSWER.

IN CHANCERY OF NEW JERSEY.

JOURNAL PLAZA HOLDING CO., a corporation, *Complainant,* *vs.* J. L. H. COMPANY, INC., a corporation, *Defendant.*	*On Bill, etc.* *Answer.*

The answer of the defendant, J. L. H. Company, Inc.

This defendant, J. L. H. Company, Inc., answering the bill of complaint says that:

1. Paragraphs 1 to 3, inclusive, are admitted.

2. Defendant admits that complainant has erected a building upon the said lands and premises; but it has no knowledge or information sufficient to form a belief as to the remaining statements in paragraph 4.

3. Paragraph 5 is admitted.

4. Defendant neither admits nor denies paragraph 6, as the same contains no allegations of fact, but only matter of law.

5. Defendant denies that it either knew of or approved any application by the complainant to the Mutual Benefit Life Insurance Company of Newark for any mortgage loan; it admits that complainant presented and tendered to defendant for execution a bond and mortgage in favor of the Mutual Benefit Life Insurance Company

of Newark, N. J.; it has no knowledge or information sufficient to form a belief as to the remaining statements in paragraph 7.

6. Defendant admits that the value of the lands and premises in question has been enhanced by the complainant's erection of said building, and it admits that it has refused and still refuses to execute the bond and mortgage presented to it by the complainant in favor of the Mutual Benefit Life Insurance Company of Newark; but it denies the remaining statements in paragraph 8. To the contrary defendant has at all times been ready and willing and now tenders itself ready and willing to execute and deliver a bond and mortgage in accordance with the provisions of the aforesaid lease.

7. Paragraph 9 is denied.

8. Defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 10.

9. Paragraphs 11 to 13, inclusive, are denied.

JOHN TRIER,
Solicitor of Defendant.

REPLICATION.

IN CHANCERY OF NEW JERSEY.

72-576.

Between

JOURNAL PLAZA HOLDING CO., a corporation,
Complainant,

and

J. L. H. COMPANY, INCORPORATED, a corporation,
Defendant.

On Bill, etc.
Replication.

The complainant joins issue with the answer filed by the defendant.

JACOB L. NEWMAN,
Solicitor of the Complainant.

OPINION.

IN CHANCERY OF NEW JERSEY.

Between

JOURNAL PLAZA HOLDING COMPANY,

Complainant,

and

J. L. H. COMPANY,

Defendant.

Opinion.

On final hearing.

1. When a complainant has performed his part of a contract and the defendant has reaped the advantages, equity will not permit defendant to escape his responsibility upon a plea that his corresponding obligation is not definitely set down. In such circumstances, when a contract has been partly executed, and, there is no adequate remedy at law, equity "will strain its power to enforce a complete performance."

2. "The strict rule is, that the party who comes into equity for a specific performance must come with perfect propriety of conduct, otherwise he will be left to his remedy at law."

3. Relief by specific performance is granted upon a consideration of all of the equities, and the equities are read into the contract by the decree enforcing it. "The court is bound to see that it really does the

complete justice which it aims at and which is the ground of its jurisdiction."

For complainant, Mr. Jacob L. Newman.

For defendant, Mr. John Trier.

BACKES, Vice-Chancellor.

The bill is to compel the defendant to execute a bond and mortgage. In 1925 the defendant leased to one Makaus premises on Pavonia avenue, Jersey City, for twenty-five years, with an option for a further lease of twenty-five years. The lease was assigned to one Reich. He assigned to Weisenfeld, an officer of complainant, who transferred it to the complainant. The lease contains this provision:

"The lessor does hereby agree and authorize the lessee at any time during the term of this lease to tear down the buildings now occupying said demised premises, and to erect a building, the plan thereof to be chosen and decided upon by the lessee upon the said demised premises. That the said lessor shall permit the said lessee, his successors or assigns to raise cash to an extent not to exceed two-third (2/3) of the value of the cost of said improvement, which money is to be secured by a bond and mortgage to be executed by the lessor, its successors or assigns, and to be a lien upon the said demised premises, and the buildings and improvements thereon. That said two-thirds of the cost of the said improvement is not to exceed the sum of fifty thousand dollars ($50,000); that the said bond and mortgage shall remain a lien upon the said demised premises and the improvements erected thereon.

"It is further agreed that the lessee shall pay all interest on the said mortgage, so raised during the term of this lease, or the term of the said bond and mortgage, said interest to be paid within thirty days from the due date.

"It is further agreed that the improvements so made on the said premises shall be the property of the lessor, subject to this lease."

The complainant erected a new building at an outlay of $150,000 and arranged with a local insurance company for a mortgage loan of $50,000, and upon the defendant refusing to execute a bond and mortgage to secure the loan, the complainant appealed to this court. In its answer defendant admits refusing to execute the bond and mortgage in the form requested, but expresses its willingness to execute such documents in accordance with the requirements of the lease, and at the hearing protested that the proposed mortgage, one for a five-year term, with interest at 5½ per cent., containing an acceleration clause upon a thirty-day default in payment of interest, had not been agreed upon, and advanced the technical defense that the contract in this respect is not complete, certain and definite, and hence, equity will not decree a specific performance. Nichols *v.* Williams, 22 N. J. Eq. 63; Moore *v.* Galupo, 65 N. J. Eq. 194; Binns *v.* Smith, 93 N. J. Eq. 33. When a complainant has performed his part of a contract and the defendant has reaped the advantages, equity will not permit defendant to escape his responsibility upon a plea that his corresponding obligation is not definitely set down. In such circumstances, when a contract has been partly

executed, and, there is no adequate remedy at law, equity "will strain its power to enforce complete performance." Fry Sp. Pr. (6th Ed.) 155. Cavanna *v.* Brooks, 97 N. J. Eq. 329.

It is, however, an inflexible rule, that to entitle a suitor to the extraordinary relief by specific performance, he must seek it "with perfect propriety of conduct." The complainant charged in its bill and at the hearing insisted that the debt of the bond and mortgage will be the defendant's obligation to pay, urging that the clause quoted at the forehead bound the defendant hand and foot, and that explanatory testimony was inadmissible. It was admitted over objection. Miller *v.* Chetwood, 2 N. J. Eq. 199. An analysis of the clause will not subject it to the interpretation sought to be imposed by complainant. The lessee was authorized to raise cash, two-thirds of the value of the improvements, for which the lessor's bond and mortgage was to stand as security. It was the lessee's project, and to put him in funds, the lessor and the property were to stand sponsor for the loan. The lessee was to borrow the money on the strength of the security of the lessor's bond and mortgage. *Inter sese* the lessee was to be the debtor. The correctness of this conception of the clause finds confirmation in the requirement that the mortgage shall remain a lien on the demised premises. To whose advantage, possibly, could this provision be if not for the lessee who ultimately was to redeem the obligation? Why should the mortgage remain a lien if it was to be the lessor's duty to pay, if it chose to satisfy it before? The only reasonable explanation is as the lessee testified, that he had planned to amortize it over the period of the lease. And that that was the scheme of the complainant

when it succeeded to the lease, is also the testimony. If doubt remains as to the true meaning it is set at rest by the defandant's own interpretation. On November 20, 1928, while Mr. Weisenfeld, who with his father-in-law, Stein, owns the stock of the complainant, an officer of the company, and an intermediate assignee of the lease, was negotiating the loan of $50,000 on behalf of the complainant, he wrote to the attorney of the defendant, then co-operating with him, as follows:

> "It was only last week that I again saw Mr. Holste (director of the defendant) and suggested to him that I had been authorized by Mr. Stein to make a proposition to him, the gist of which was, that if the Holstes would permit us to raise a mortgage of $100,000 that we, in turn, would pay $1,000 per year additional rent on the lease that we now hold. * * * I believe that the above proposition is a worthy one for them to consider as it certainly will not jeopardize their interest in their property, and if anything, gives them additional revenue."

And on the 26th of the month following he again wrote:

> "If it is their (defendant) intention to accept our proposition for an additional rental of $1,000 annually in consideration of which they will permit us to raise a mortgage of $100,000 please let me know accordingly."

The letters tell the story. They, as well, bear plenary proof, not only of complainant's duplicity towards the court from which it seeks favors, but also of an unconscionable attempt to

overreach the defendant, the usual penalty for which is a denial of relief. "The strict rule is this, that the party who comes into equity for a specific performance must come with perfect propriety of conduct, otherwise he will be left to his remedy at law." King *v.* Morford, 1 N. J. Eq. 281; Miller *v.* Chetwood, *supra;* Clickner *v.* Clickner, 95 N. J. Eq. 479; Newark Cleaning & Dye Works *v.* Gross, 6 Adv. Rep. 598; Pfender *v.* Pfender, 7 Adv. Rep. 142, aff. Oct. 14, 1929. It was a conscious and bald effort to defraud the defendants of a large sum of money under pressure of artful legal proceeding, and to relax the rigor of the rule, upon the complainant giving security to redeem the mortgage, would not only expose the defendant to a possible repetition but also put upon it the burden of constant vigilance against the cunning of dishonest men.

Complainant's counsel, a highly esteemed member of the bar, is not involved. It does not appear that the letters, even to now, have come to his attention. They were offered in a group with others, by his consent, without inspection. His failure to comment upon them in his brief is assurance that they escaped him.

Near the close of the hearing the defendant moved for leave to file a counter-claim to reform the lease so that it would read, in effect, that the complainant eventually was to pay the debt. Relief by specific performance is granted upon a consideration of all of the equities, and the equities are read into the contract by the decree enforcing it. McCormick *v.* Stephany, 57 N. J. Eq. 257; Miller *v.* Chetwood, *supra.* "The court is bound to see that, it really does the complete justice which it aims at and which is the ground

of its jurisdiction." King *v.* Morford, *supra.* The matter should have been set up in defense, not counter-claim. It was, with other things, set up in the eighth paragraph of the bill by way of anticipating one of the defendant's reasons for refusing to perform and was met by an omnibus denial of all the reasons. This was obviously an inadvertence, for it was the principal issue at the hearing, tried and decided. An amendment will be allowed.

The bill will be dismissed.

ORDER AMENDING ANSWER.

Nunc Pro Tunc.

IN CHANCERY OF NEW JERSEY.

JOURNAL PLAZA HOLDING CO., a corporation, *Complainant,* *vs.* J. L. H. COMPANY, INC., a corporation, *Defendant.*	*On Bill, etc.* *Order Amending Answer.* *Nunc Pro Tunc.*

This matter being opened to the Court by John Trier, solicitor of the defendant, J. L. M. Company, Inc., in the presence of Jacob L. Newman, solicitor of the complainant, Journal Plaza Holding Co.;

And application being made by said defendant for leave to amend its answer nunc pro tune, as hereinafter set forth;

And the Court being satisfied that the defendant by inadvertence answered the eighth paragraph of the bill of complaint filed herein, in paragraph six of said defendant's answer as follows:

> "Defendant admits that the value of the lands and premises in question has been enhanced by the complainant's erection of said building, and it admits that it has refused and still refuses to execute the bond and mortgage presented to it by the complainant in favor of the Mutual Benefit Life Insurance Company of Newark; but it denies the remaining statements in paragraph 8. To

the contrary defendant has at all times been ready and willing and now tenders itself ready and willing to execute and deliver a bond and mortgage in accordance with the provisions of the aforesaid lease,"

and that said defendant should be allowed to amend said paragraph six of its said answer, so as to read as follows:

"Defendant admits that the value of the lands and premises in question has been enhanced by the complainant's erection of said building; it admits that it has refused and still refuses to execute the bond and mortgage presented to it by the complainant in favor of the Mutual Benefit Life Insurance Company of Newark; and it admits that one of its reasons for such refusal is that it, the defendant, is not bound to assume the payment of the principal of said mortgage and that on the contrary, the principal of said mortgage should and would be payable by the said complainant, and that it, said defendant, upon the execution of any mortgage by it should and would be entitled to be guaranteed, protected and saved harmless by said complainant against any liability by it, the said defendant, to pay the said mortgage or any part thereof; but it denies the remaining statements in paragraph 8. To the contrary, defendant has at all times been ready and willing and now tenders itself ready and willing to execute and deliver a bond and mortgage in accordance with the true intent and meaning of the provisions of the aforesaid lease."

It is on this Sixth day of November, Nineteen Hundred and Twenty-nine, ORDERED, that the said

defendant be and it is hereby granted leave to amend its said answer as hereinbefore set forth; and

It Is Further Ordered, that the said answer of said defendant be and the same is hereby considered as being amended as of the date of its filing so that paragraph six of said answer shall read as follows:

> "Defendant admits that the value of the lands and premises in question has been enhanced by the complainant's erection of said building; it admits that it has refused and still refuses to execute the bond and mortgage presented to it by the complainant in favor of the Mutual Benefit Life Insurance Company of Newark; and it admits that one of its reasons for such refusal is that it, the defendant, is not bound to assume the payment of the principal of said mortgage and that on the contrary, the principal of said mortgage should and would be payable by the said complainant, and that it, said defendant, upon the execution of any mortgage by it should and would be entitled to be guaranteed, protected and saved harmless by said complainant against any liability by it, the said defendant, to pay the said mortgage or any part thereof; but it denies the remaining statements in paragraph 8. To the contrary, defendant has at all times been ready and willing and now tenders itself ready and willing to execute and deliver a bond and mortgage in accordance with the true intent and meaning of the provisions of the aforesaid lease."

Respectfully advised,

John H. Backes,
V.-C.

FINAL DECREE.

Filed November 7, 1929.

IN CHANCERY OF NEW JERSEY.

JOURNAL PLAZA HOLDING CO., a corporation, *Complainant,* *vs.* J. L. H. COMPANY, INC., a corporation, *Defendant.*	*On Bill, etc.* *Final Decree.*

This cause coming on to be heard in the presence of Jacob L. Newman, solicitor of the complainant, Journal Plaza Holding Co. and John Trier, solicitor of the defendant, J. L. H. Company, Inc.;

And the Court having examined the pleadings and having taken proofs orally and in open court and heard and considered the arguments of counsel and being satisfied that the complainant is not entitled to the relief prayed for by it in its bill of complaint filed herein;

It is on this sixth day of November, nineteen hundred and twenty-nine, ORDERED, ADJUDGED AND DECREED, that the complainant's bill of complaint be and the same is hereby dismissed with costs, including a counsel fee of five hundred ($500) dollars, which is hereby allowed to said defendant; and that in default of the payment of said costs and counsel fee by said complainant within ten days after the service upon it of true but uncertified copies of this decree and of said taxed costs, execution issue therefor according

to the practice of this court, against the goods and chattels, lands, tenements, hereditaments and real estate of the said complainant, Journal Plaza Holding Co.

E. R. WALKER,

C.

Respectfully advised,

JOHN H. BACKES,

V.-C.

I hereby approve the within decree as to form.

JACOB L. NEWMAN,
Solicitor of Complainant.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

72-576.

Between

JOURNAL PLAZA HOLDING CO., a corporation,
Complainant,

and

J. L. H. COMPANY, INCORPORATED, a corporation,
Defendant.

On Bill, etc.

Notice of Appeal.

The complainant, Journal Plaza Holding Co., a corporation, hereby appeals from the whole and every part of the final decree dated November sixth, nineteen hundred and twenty-nine, made in this court by the Chancellor, on the advice of Vice-Chancellor John H. Backes, in the above-entitled cause, to the Court of Errors and Appeals, the court of last resort in all cases.

Dated November 15, 1929.

JACOB L. NEWMAN,
Solicitor for Complainant.

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

JACOB L. NEWMAN,
Of Counsel.

Service of a copy of the within notice of appeal is herewith acknowledged, this day of November, 1929.

Solicitor for Defendant.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JOURNAL PLAZA HOLDING CO., a corporation, *Complainant-Appellant,* *and* J. L. H. COMPANY, INCORPORATED, a corporation, *Defendant-Respondent.*	*On Appeal, etc.* *Petition.*

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

The petition of Journal Plaza Holding Co., a corporation, the appellant in the above-entitled cause, respectfully shows:

1. That your petitioner finds itself aggrieved by the final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the sixth day of November, nineteen hundred and twenty-nine, in a cause therein pending, wherein the said Journal Plaza Holding Co., a corporation, was complainant, and the said J. L. H. Company, Incorporated, a corporation, was defendant, in the following respects, to wit:

(a) That the said decree orders, adjudges and decrees that the bill of complaint filed in the Court of Chancery by the appellant be dismissed, with costs, whereas the relief prayed

for by the petitioner in the bill of complaint should have been granted.

(b) That the learned Vice-Chancellor below, over objection of appellant, admitted parol evidence of conversations taking place at or before the lease in question was executed, attempting to vary the terms thereof.

(c) That the learned Vice-Chancellor below construed the lease in question to impose the ultimate liability to pay the mortgage to be raised thereunder upon the appellant, tenant of said premises, whereas the liability is one to be discharged by the respondent, landlord of said premises.

(d) That the learned Vice-Chancellor below denied the appellant relief on the ground that it did not come into court with perfect propriety of conduct, whereas appellant's conduct throughout the entire negotiation and subsequent litigation has been open, fair and equitable in every respect.

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

Dated November 20 1929.

JACOB L. NEWMAN,
Solicitor for and of Counsel
with Complainant-Appellant.

Service of a copy of the within petition is herewith acknowledged, this 27th day of November, 1929.

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

ANSWER TO PETITION ON APPEAL.

Filed December 18, 1929.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOURNAL PLAZA HOLDING CO., a corporation, *Complainant-Appellant,* *vs.* J. L. H. COMPANY, INC., a corporation, *Defendant-Respondent.*	*On Appeal from the Court of Chancery.*

The answer of J. L. H. Company, Inc., the above-named respondent, to the petition of appeal of Journal Plaza Holding Co., the above-named appellant.

This respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on November 6, 1929, made and entered in the Court of Chancery of New Jersey in the above-entitled cause for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this respondent begs leave to refer thereto when the same shall be produced.

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

JOHN TRIER,
Solicitor for and of Counsel
with Respondent.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

May 2, 1929.

Between

JOURNAL PLAZA HOLDING COMPANY,

Complainant,

and

J. J. H. COMPANY, a corporation,

Defendant.

Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor John H. Backes, Vice-Chancellor, at the Chancery Chambers, in the City of Newark, New Jersey, in the presence of Jacob L. Newman, Esq., for complainant, and John Trier, Esq., for defendant.

Mr. Trier: There was a motion to strike out the bill of complaint which was adjourned until today.

The Court: You may take an order that your answer be filed, reserving your right to quash.

Mr. Newman: I offer in evidence the original lease, dated September 25, 1925.

(Paper marked Exhibit C. 1.)

Mr. Newman: I offer in evidence three separate assignments vesting the title of the lease in the Journal Plaza Holding Co.

(Papers marked Exhibits C. 2, C. 3 and C. 4.)

Mr. Trier: All that is admitted in the answer. We deny all allegations of fraud, and we say that the bond and mortgage tendered to us for execution was not such as, under the terms of the lease, we were bound to execute.

HARRY STEIN, sworn for complainant.

Direct examination by Mr. Newman.

Q You are connected with the Journal Plaza Holding Co.? A I am.

Q And what is your office there? A I am president of the company.

Q Did the Journal Plaza Holding Co. acquire this lease by the assignments that are in evidence? A It did.

Q At the time you acquired it was it vacant land? A Vacant land.

Q What did you erect thereon? A I erected a three-story building, eight stores and two flats above.

Q And where is the land and building located? A Corner of Pavonia avenue and Boulevard, Jersey City.

Q I show you a picture and ask you if that is a correct reproduction of the building you erected thereon? A It is.

Mr. Newman: I offer it in evidence.

Mr. Trier: I object to it as immaterial.

(Paper marked Exhibit C. 6.)

Q What did it cost to erect that building? A In the neighborhood of $175,000. The building itself cost $150,000 and I paid for the assignment of the lease $25,000. My investment is, $175,000.

Q The actual cost of constructing the building, we desire. A $150,000.

Q After you had completed the building did you make application on behalf of the J. J. H. Company, the owners, for a mortgage loan? A I did.

Q And did you procure that loan? A I have.

Q And from what institution? A From the Mutual Benefit Life Insurance Co.

Q And in what amount? A $50,000.

Q And after you had procured that loan was this bond and mortgage which I show you prepared? A It was.

Q And was it submitted through your counsel to the J. J. H. Company for execution?

Mr. Trier: I object to it as hearsay.

The Court: Objection overruled.

Q You may answer the question, please. A It was.

Q And did they refuse to execute the bond and mortgage?

The Court: What happened?

Q What happened? A They refused to execute the bond and mortgage—they refused to sign the bond and mortgage.

Mr. Newman: I ask for the production of a letter dated November 9, 1928, from Weisenfeld to Holste.

Mr. Trier: (Producing letter.)

Mr. Newman: I offer it in evidence.

(Paper marked Exhibit C. 7.)

Q What office does Mr. Holste hold in the J. J. H. Co.? A I do not know, but I know he is one of the gentlemen—(interrupted).

Q Is he an officer of the company? A Yes, sir, but what officer I don't know.

Mr. Newman: I call for the production of a letter dated December 31, 1928, from Mr. Weisenfeld to the J. J. H. Co.

I offer a copy of the letter.

(Paper marked Exhibit C. 8.)

Mr. Newman: I offer letter of Mr. Holste in answer to the previous letter.

(Paper marked Exhibit C. 9.)

Mr. Newman: That letter is addressed to Samuel Weisenfeld.

The Court: Who is Weisenfeld?

Mr. Newman: He is the attorney who represented the Plaza Holding Company at the time of these negotiations.

The Court: Who wrote this letter?

Mr. Newman: It was written by the J. J. H. Co., in answer to the letter written to Louis H. Holste, one of the officers of the company.

Mr. Trier: He is the Treasurer.

Mr. Newman: I have a letter written by Mr. Schlittenhart, Mr. Schlittenhart representing the J. J. H. Co., the owners of the land, Weisenfeld representing the lessee. I offer it in evidence.

(Paper marked Exhibit C. 10.)

Mr. Newman: I offer a letter of January 18, 1929, to Mr. Schlittenhart from the Journal Plaza Holding Co., signed by Weisenfeld.

(Paper marked Exhibit C. 11.)

Mr. Newman: Letter of February 16, 1929, I offer it in evidence.

(Paper marked Exhibit C. 12.)

Mr. Newman: I ask that the enclosures be marked as one exhibit:

(Papers marked Exhibit C. 13.)

Mr. Newman: I offer in evidence letter dated February 18, 1929, directed to me by Mr. Henry Schlittenhart.

(Paper marked Exhibit C. 14.)

Mr. Newman: I offer letter of April 9, 1929.

(Paper marked Exhibit C. 15.)

Mr. Newman: I offer in evidence the enclosures, bond and mortgage drawn by the Mutual Benefit Life Insurance Co., together with the certificate of the Secretary and the authorization to pay the proceeds to us, as one exhibit.

(Paper marked Exhibit C. 16.)

Mr. Newman: I offer letter dated April 9, 1929.

(Paper marked Exhibit C. 17.)

Mr. Newman: I offer letter dated April 13, from Schlittenhart to me.

(Paper marked Exhibit C. 18.)

(No cross examination.)

CLARENCE H. ALEXANDER, sworn for complainant.

Direct examination by Mr. Newman.

Q You are connected with the Mutual Benefit Life Insurance Co.? A I am, member of the law department.

Q In what capacity? A Member of the law department.

Q How long have you been connected with them as a member of the law department? A Thirty years.

Q Have you charge of drawing bonds and mortgages and closing transaction relating to loans? A I have.

Q I show you a bond and mortgage prepared in your office from the J. J. H. Company to the Mutual Benefit Life Insurance Co., bond for five years, at 5½%, and ask you whether that was drawn in your office? A They both were drawn in my office.

Q I ask you if that is the customary bond and mortgage used by your company.

Mr. Trier: I object.

The Court: Answer.

A It is.

Q And has been in use by your company for how long a period?

Mr. Trier: I object.

A For a number of years past. We change the form a little bit from time to time, but it is substantially the same form.

Clarence H. Alexander, cross.

Q Do you know what form other large finance companies use? A Quite similar to this.

The Court: Substantially the same?

The Witness: Substantially the same, your Honor.

Q When I speak of other companies I mean New Jersey companies. A Jersey companies.

The Court: Or New York companies lending money in this neighborhood.

The Witness: Loaning money in this neighborhood.

The Court: That is substantially the same.

The Witness: Substantially the same mortgage.

Cross examination by Mr. Trier.

Q You were requested this morning by us to produce the application for that mortgage? A As a matter of fact, there is no— (interrupted).

Q And you refused to do so? A I refused to do so.

The Court: Why?

The Witness: Well, it was part of the company's records, your Honor—private records of the company.

The Court: Did he subpoena it?

The Witness: He did not subpoena it, no, sir. If he had subpoenaed it I would have brought it.

Mr. Trier: I would like to state at this time we have a witness who is in Arizona and we think we can produce him here.

The Court: Today?

Mr. Trier: Not today.

The Court: When?

Mr. Trier: A week or ten days' time. He is a sick man.

The Court: Do you want this application?

Mr. Trier: Yes, sir.

The Court: I will adjourn the case until two o'clock.

Mr. Trier: I can cross examine otherwise.

Q Have you a copy of that, Mr. Alexander? A Not with me. I can have it within a very short time.

Mr. Trier: I asked him to bring the entire file. I don't know what he has.

The Witness: That is all I recall—rough memorandum and report of the title company showing the condition of the title.

The Court: We are not interested in that. Just your original file. Do you want a subpoena?

The Witness: If your Honor directs me to bring it, I will bring it.

The Court: Two o'clock.

Q I show you a copy of a letter dated February 18, 1929. Did your company receive the original of that letter from Mr. Schlittenhart? I will show you your answer, which will refresh

your recollection. A I think we did. I receive so many letters that—(interrupted).

Q I show you the answer, to refresh your recollection. A Yes, sir.

Mr. Trier: I now ask that they be marked.

(Papers marked Exhibits D. 1 and D. 2.)

Q You remember Mr. Schlittenhart calling on you at the office of the company in the month of April? A I do.

Q And you remember he had a conversation with you concerning this bond and mortgage? A I do.

Q Will you tell us what that was?

Mr. Newman: I object.

The Court: Neither competent nor cross examination.

Mr. Trier: That is all now. I want to cross examine him when he produces the application.

The Court: I was wondering whether he could not send it down. Is that all you want, the application?

Mr. Trier: I want whatever he has in his file.

COMPLAINANT RESTS.

WILLIAM E. SEWELL, sworn for defendant.

Direct examination by Mr. Trier.

Q You are a solicitor of this court? A I am.

Q And I show you a lease marked Exhibit C. 1, and I ask whether that was drawn in your office? A It was.

Q And referring to the provision on—perhaps you can find it more quickly—concerning the execution of the mortgage. A You are referring, probably, to the paragraph that begins on the fourth page, I presume.

Q Yes. It is the paragraph containing the provisions concerning the mortgage. A Yes, sir.

Q Were both the lessor and lessee of that lease present at your office when those terms were being discussed? A Yes, sir.

Q And will you tell us—(interrupted). A That is, when you say that, I must qualify that. You see, the lessor is a corporation. The three Holste brothers were present there, each respectively officers of the company, and Mr. Makaus was present.

Q Mr. Makaus was the lessee, the original lessee, is that right? A Yes, sir. I made a mistake. It is spelled M-a-k-a-u-s.

Q Now, will you tell us what was done—will you tell us what the conversation concerning that provision was at the time the lease was drawn up.

Mr. Newman: I object to that. I do not see how he can introduce parole evidence to explain what that was. After they had their conversation it was reduced to writing

and it is here, and I do not see that any conversation had as to what was understood or intended at that time is evidential.

The Court: I do not know. I only read what counsel showed me here.

The Witness: That is the only provision.

The Court: Nothing else in here that refers to it?

The Witness: I think not, no, sir. At the bottom of page 4, your Honor.

RECESS.

The Court: If it is not complete or explicit or it is ambiguous, then you can produce testimony. If the verbal conversation is all embodied in the paper and makes the subject-matter complete in the paper itself, then that is not admissible. I must settle in my own mind whether I can vision this thing as a complete article itself. Read the question.

Q (Question read as follows: "Now, will you tell us what was done—will you tell us what the conversation concerning that provision was at the time the lease was drawn up."

The Court: Objection sustained, unless you examine into the terms of the mortgage.

Q What, if anything, was said as to the terms of the proposed mortgage under this proposed lease?

The Court: Anything?

The Witness: Yes, sir. Shall I continue, your Honor?

The Court: As to the terms?

The Witness: Yes, sir.

Mr. Newman: May I note an objection?

The Court: Yes.

The Witness: I might say it is going to be very difficult, your Honor.

The Court: Please answer the question.

The Witness: Regarding (interrupted).

The Court: You are a lawyer. The admissibility is limited.

The Witness: I am realizing that. That is what I am trying to curtail. It was stated at the time—that question was put to me by both Mr. Makaus and the three brothers of the J. J. H. Company, as to what kind of a mortgage could be placed on this property, as to the length—duration of the mortgage, when the mortgage would have to be paid off, as to what—whether there would be paid off so much a year, in other words, amortization; and I explained to the parties that on account of the unsettled condition of the property at that time, having no—at that time the property had two—one two-family house and one one-family house on it. I told them it was impossible for me to see where they could raise the money—what institution—and it was impossible for me to tell what terms that institution would insist upon, and they verbally agreed that they would have no trouble, that they would get together on any such differences they might have in that regard; and that—as to the time the mortgage should stand—I told them the same thing, that I didn't know how long an institution would permit a

mortgage to stand. And Mr. Makaus said that he would be willing to amortize the mortgage over a period of years, according to his—to the requirements of the institution or his ability, and we figured up that if the building cost $75,000—that is what they planned to expend—that it require a mortgage of $50,000, that amortizing that mortgage at 3% would pay off the mortgage in a little over the first twenty-five years of the mortgage, but— (interrupted).

Q Was there any agreement as to time? That is what we want to know. That the mortgage was to run, and the terms? A There was no agreement made as to definite time the mortgage should run.

The Court: That is what I want to know. All the rest of the testimony will go out, on your motion.

Mr. Newman: Yes, sir.

No cross examination.

CLARENCE H. ALEXANDER, recalled for further cross examination.

By Mr. Trier.

Q Have you produced the application and other papers in the matter? A Yes, sir, and I have also produced photostatic copies thereof.

Q This paper that I show you is the original application made to your company? A Original application, yes, sir.

Mr. Trier: I offer it.

Mr. Newman: No objection.

The Witness: Not the original, please. I prefer to have the photostatic copy. We do not want them out of our records. I presented the photostatic copy for that purpose, Mr. Trier.

Mr. Trier: All right. I withdraw my offer and I will offer what the witness states to be a photostatic copy of the original application.

(Paper marked Exhibit D. 3.)

Q Now, I call your attention to the fact that the application which has just been put in evidence bears the signature of J. J. H. Company, Inc., by J. L. Newman, attorney. A It does.

Q Did you at any time inquire of the J. J. H. Company whether Jacob L. Newman was its attorney?

Mr. Newman: I object.

The Court: Objection overruled.

A No.

Q You were later informed by Mr. Schlittenhart, were you not, that he was the attorney for the J. J. H. Company?

The Court: That he—who?

Q That he, Mr. Schlittenhart, was the attorney of the J. J. H. Company.

Mr. Newman: I object.

The Court: Were you?

The Witness: I was.

Clarence H. Alexander, recalled, Further cross.

Q And did you then, after receiving that information, take up the matter either with Mr. Newman or with the lessee, the Journal Plaza Holding Co.? A With Mr. Newman. Mr. Newman was the man I took up every question with, or Mr. Schlittenhart, depending on what it was.

Q I am asking you whether, when you were informed by Mr. Schlittenhart that he was the attorney for the J. J. H. Company which appeared on this application and not Mr. Newman who had undertaken to sign for the J. J. H. Company—I am asking you whether you then took up that matter? A With Mr. Newman?

Q With Mr. Newman? A No.

Mr. Trier: Now I would like to call Mr. Alexander as my own witness.

Q Mr. Alexander, when Mr. Schlittenhart came to see you on behalf of the J. J. H. Company some time in April, 1929, concerning this projected loan, what did he say to you about it?

Mr. Newman: I do not see how that is material. I object to that.

The Court: No fraud has been proven yet.

Mr. Trier: It is in the pleadings.

The Court: Objection sustained. Recall Mr. Sewell.

William E. Sewell, recalled.

WILLIAM E. SEWELL, recalled.

The Court: Read the question that was put to Mr. Sewell that I overruled.

Q (Question read as follows): "Now, will you tell us what was done—will you tell us what the conversation concerning that provision was at the time the lease was drawn up."

The Court: Mr. Newman objects, the objection is sustained, and the witness directed to give his testimony for the record. If the case is going to the Court of Appeals, that court ought to have the benefit of his testimony.

The Witness: Should I answer the question?

The Court: I am putting it on the record in case I am wrong.

The Witness: After the terms were agreed upon as to the rent, the question came up— (interrupted).

The Court: Please read the question.

Q (Question read.) A After we agreed upon the terms as to the rent, the question came up as to what kind of a building was going to be constructed there. Mr. Makaus said that the most money that he felt that he could put into the proposition would be between twenty and twenty-five thousand dollars. It was more or less the consensus of opinion that the building would cost in the neighborhood of $75,000. I turned to the three Holstes and told them that the only way the lease could go through would be to put Makaus in a position where he could

build the building—construct the building. I told him that they should assist him by placing a mortgage upon their land, because Makaus would find it impossible to get a lease on the building because of the fact that, under the terms of the lease, the building became the property of the lessor, that Makaus could pay back this money and pay off this mortgage out of the rents that would come in from the building. The question then came up, as I previously testified, as to how long this mortgage should stay on the property. I informed them it would be impossible for me to say that; I did not know; in the first place, we did not know how much mortgage would be required; in the second place, we didn't know what institution it could be obtained from, and lastly, that we did not know how long that institution would let it stay—remain. But I told them that arrangements would be carried out this way, that, if that mortgage was called by the institution that did place it on at any time, that the J. J. H. Company would agree to let a new mortgage be made and carry that mortgage on, or successive mortgages, until Makaus had completed payment, amortizing so much a year, and my recollection is we figured about 3% a year. It was entirely a transaction at that time that—merely to assist Makaus in constructing this building.

Q You said, I think, that Makaus would not be able to get a lease on the building; did you mean that, or did you mean mortgage? A I meant to say mortgage. If I said lease, pardon me.

No cross examination.

JULIUS L. REICH, sworn for defendant.

Direct examination by Mr. Trier.

Q You were a partner of Mr. Sewell at the time the lease was executed? A I was and still am.

Q And were you present at the time the three Messrs. Holstes— (interrupted).

The Court: Same testimony?

Mr. Trier: Yes.

The Court: Is it to be controverted?

Mr. Newman: No, sir.

Mr. Trier: His recollection might be a little different. I am trying to bring out all the facts I can. It is a long time ago.

The Court: It has been testified to by a reputable witness.

Mr. Trier: I thought he might be able to add something.

Q Were you present at the conference which led to the drawing up and execution of the lease? A I was.

Q Now, I will put the other question first: Was there anything said concerning the terms of the mortgage which was eventually written into the terms of the lease? A Yes, sir; there was some discussion.

Q Will you tell us what you remember of that discussion?

Mr. Newman: This is taken subject to my objection.

The Court: Well, it was a conference that was held—confine yourself to that.

The Witness: The question arose at the time that the discussion went on as to the likelihood of Mr. Makaus being in a financial position— (interrupted).

The Court: Strike it out. Strike out the question. Strike out all that he has said. Listen to the question. Was there anything said about the time?

The Witness: No.

The Court: Was there anything said at the time as to how long the mortgage was to run?

The Witness: There was not.

Q I will ask the other question. Will you tell us the conversation concerning the mortgage which eventually was put into the terms in the lease?

Mr. Newman: I want to record my objection.

The Court: Objection sustained. You may proceed.

The Witness: The question came up that since even the street line at that time was not decided on, the bridge was just in process of construction, and Mr. Makaus not being in a financial position, as we discussed it among ourselves, to personally handle the building of a building— (interrupted).

The Court: He is asking you to say what took place there, not what took place somewheres else or what you have discussed at other times. What took place then between the brothers and Makaus?

The Witness: The Holstes agreed—(interrupted).

The Court: No. What happened? What was said?

The Witness: Mr. Makaus said he was not in a position to put in a lot of money for the construction of a building at that point and the Holstes agreed that they would go on a bond and mortgage to help him finance it to the extent—limiting their liability to $50,000 on bond and mortgage and that this money was to be returned to them. Or the mortgage, in other words, was to be paid off in an amortization process that Mr. Makaus said he would assume when the matter was finally arranged. There was no definite term used as to how long the mortgage was to run; there was no definite amount fixed as to the amortization, but it was to be amortized, if my memory serves me correctly, approximately three or a little more per cent. a year, in order to wipe it out during the first period of this lease.

Q Who was to amortize it? A Mr. Makaus.

Cross examination by Mr. Newman.

Q Are you a member of the bar? A Yes, sir.

Q Partner of Mr. Sewell? A Yes, sir.

Q Have no interest in this lease? A No.

Q Did you draw it or did Mr. Sewell draw the lease? A My recollection is that we both drew it.

Q If there was to be any amortization, didn't you think that was an essential part to be put into the lease? A That was not known at the time. We didn't know what process was going to be employed at the time that the lease was

drawn. The amortization proposition was discussed subsequent to the drawing of this lease:

Q Then that occurred after the lease had been drawn? A Not after the final lease had been drawn—not after this lease that is in question here, but when we were drafting the lease that matter had come up for discussion, but since everything was so indefinite, even as to the lines of this property, that was left in abeyance, and it was not done with any intention of—(interrupted).

Q I did not ask you the intention. In any event, it was not inserted in the lease? A Apparently not.

Mr. Trier: I make an offer of this testimony, if the Court please, that Mr. Reich and his partner brought to the attention of Mr. Weisenfeld— (interrupted).

The Court: If you have got any testimony to put in, put it in.

Re-direct examination by Mr. Trier.

Q At the time of the proposed assignment of this lease from Dr. Reich to Mr. Weisenfeld, did you have any conversation with Mr. Weisenfeld concerning the mortgage feature of the lease? A Yes, sir; I did.

Q Will you tell us what that was?

Mr. Newman: I object.

The Court: Who was Reich?

Mr. Trier: Reich was the first assignee of the lease.

The Court: Who is Weisenfeld?

Mr. Trier: He was an officer in the corporation. This was long after the lease was executed.

Q (Question read.)

Mr. Newman: I object.
The Court: Overruled.

A I had various talks with Mr. Weisenfeld about this proposition before it was finally consummated, and a great many times we figured up the probabilities of this particular transaction, as to the rents, expenses, taxes, water rents and the amortization was figured at that time.

Mr. Newman: All subject to my objection.
The Court: It doesn't do any harm.

Q Just concerning the mortgage feature. A I explained to Mr. Weisenfeld that the mortgage feature of this particular lease gave the lessees the added advantage of this $50,000, with a privilege, or rather, with the amortization feature, and gave them the use of that money over that period of years.

Q What period of years? A Well, for the time that they can make arrangements to get it for.

Re-cross examination by Mr. Newman.

Q Nothing was inserted in the assignment to that effect, either, was there, about the amortization? A I did not prepare the assignment.

William E. Sewell, recalled, Further direct.

WILLIAM E. SEWELL, recalled for further direct examination.

By Mr. Trier.

Q Mr. Sewell, shortly before the lease was signed by the present complainant in this cause, did you have any conversation with Mr. Weisenfeld, who represented the complainant, concerning the mortgage feature of the lease? A Yes, sir.

Q Will you tell us what those conversations were?

Mr. Newman: Subject to my objection.

A In getting an assignment of the lease from Dr. Reich Mr. Weisenfeld—it was pointed out to Mr. Weisenfeld that it was a considerable advantage in the lease in that the lessor would assist in the erection of a building and that they would help to finance this $50,000. The conversation included the taking of a paper and pencil and figuring out the various items of expense and one thing and another of the lease and showing what the probable rent would be in the building to be constructed, and one of the items included in there was the amortization would be $1,500 a year, 3% on the $50,000, and my recollection is that there was no conversation as to when that money would have to be paid off, except that it had to be paid off, and we always figured the better way to do it would be to amortize it about 3% a year.

Q Amortized by whom? A By the lessee, by the man who took over the lease.

William E. Sewell, recalled, Further direct.

By the Court.

Q How did this conversation come about? A The conversation came about this way, your Honor, that naturally, in selling a lease, we had to point out the advantages.

Q You were at that time about to sell to Weisenfeld? A Yes, sir.

Q That was one of the inducements held out? A Yes, sir.

Q What did he say to that? A He said he would take it up with Mr. Stein.

Q Who was Mr. Stein? A Mr. Stein, he said, was his father-in-law. I have never met Mr. Stein, and that he would let us know, and then shortly after that we got together and drew up the agreement to assign the lease.

Q Was anything further said about the amortization? A I do not recall anything in particular, your Honor. Quite a while ago and I haven't been thinking of it very much.

Direct examination (continued) by Mr. Trier.

Q Did Mr. Schlittenhart come to your office last month to inquire from you concerning the terms of the lease—concerning the mortgage? A He did, yes, sir. I don't know whether that is the reason he came there. That conversation came up.

Q You had such a conversation. Will you tell us what was said at that conversation?

Mr. Newman: I object.

The Court: Objection sustained.

William E. Sewell, recalled, cross.

Cross examination by Mr. Newman.

Q Have you any interest in this lease? A No, sir.

Q None whatsoever? A In the lease, no, sir.

Q In anything concerning the lease? A You say concerning. If you want me to explain the whole thing I will be glad to do so.

Q You have an interest in it, haven't you? A In the lease, I have not.

Q All right. In the money arising out of it? A Except in this way, that during the time that Dr. Reich was carrying this lease he was paying rent approximately—I think it was around $7,000.

Q Can't you just tell us what your interest is?

The Court: He is telling you.

A I am telling you the best I can. It became quite a drag on him. He was unable to finance the erection of the building and I from time to time loaned Dr. Reich money. When the lease was closed Mr. Weisenfeld insisted that $5,000 be placed in escrow waiting until the $2,000 first mortgage that is now on the property be cancelled and then until some other litigation which involved an agreement should be settled—that litigation has been settled by Vice-Chancellor Fielder, who decided that the agreement was void—and the only thing, as I understand, that is holding up the money is the $2,000 mortgage. Now, I have got an interest in that money in respect that Dr. Reich owes me that money; but I do not own that money myself.

The Court: What agreement? Not this agreement?

The Witness: No. It was agreement, so your Honor will thoroughly understand the situation—it had nothing to do with Mr. Weisenfeld.

Q You had this conversation with Mr. Weisenfeld at the time you drew the assignment, is that correct?

The Court: Before the assignment.

The Witness: I think it was before.

Q Before the assignment was drawn? A I think it was before it was drawn.

Q Did you draw the assignment? A If I looked at it I could tell. I really do not know, it is so long ago. I may have drawn it or may not. I probably would recognize it if I did. I really do not know whether Mr. or I drew that.

Q Did you see it before it was executed? A Oh, sure.

Q And you read it over? A Yes, surely.

Q You didn't think it essential to put in anything about this so-called amortization, did you? A No, I did not. I thought the matter was understood. I didn't pay too much attention to that. Mr. Weisenfeld was a member of the bar and nothing was said to me about it.

HENRY SCHLITTENHART, sworn for the defendant.

Direct examination by Mr. Trier.

Q Mr. Schlittenhart, you are a member of the bar? A I am.

Q And you have for some time past been attorney for the J. J. H. Company, the defendant in this case? A Since the summer of 1926, I think.

Q And what was the occasion of your being retained by them? A I was retained by the J. J. H. Company through Louis Holste, one of its officers, as its general counsel.

Q And in the matter concerning this lease or some other matter? A Well, generally in relation to the corporation itself and of course this lease of the property.

Q Now, when did the first business or discussion concerning the mortgage feature of the lease come up? A Some time shortly after my having been retained by the company they asked me for a construction of the lease with respect to another item in the lease which had no bearing on the mortgage at all. There seemed some doubt in their mind as to the obligation on their part, different to the obligation they assumed by the lease. I suggested that it would be a good thing to go over the lease in general with them and let them know what the executed lease obligated them to, and it was then for the first time that not only the question of the mortgage came up, but this prior transaction.

Q And about when was that? A Well, that, I would say, was towards the end of that year. It was before the lease had been assigned. I think it was then in Dr. Reich's hands, or Mr. Makaus.

Q And when did you first hear from the other parties concerning the mortgage? A You mean the complainant?

Q I mean any one, the complainant or any lessee before him, concerning the mortgage feature? A If I may be permitted, I would like

to tell what happened and how I interpreted this lease for them.

Mr. Newman: I do not think it is material, what interpretation he put on this lease for these people, and therefore I object to it.

The Court: There is nothing before me. Go on and try the case.

Mr. Newman: I object.

The Court: To what? He hasn't started to tell anything.

Q What was your interpretation of the lease given to your clients?

Mr. Newman: I object.

The Court: Objection sustained.

Q When did you first hear from or on behalf of the lessee under the lease concerning the mortgage feature? A The first I heard with respect to any specific mortgage on the property was through our client stating that Mr. Weisenfeld— (interrupted).

The Court: Please answer this question.

The Witness: Do you want me to fix the time?

The Court: No. Listen to the question.

Q (Question read.) A Was when a request kas made that we consent to the giving of a $100,000 mortgage in consideration of an additional rental of a thousand dollars a year.

Q Can you tell about when that was? A I think it was either in October or November, 1928.

The Court: That was with the present complainant?

The Witness: Yes, sir.

Q November 1, 1928. And you sent a letter to Mr. Weisenfeld upon the subject?

The Court: Haven't we got all that now? All the correspondence?

Mr. Trier: No.

The Court: Have you the correspondence here?

Mr. Trier: Yes, sir.

The Court: Put it all in at once.

Q I show you a number of carbon copies and original letters and ask you whether that is the correspondence to and from you concerning the mortgage provision of the lease? A Those are the letters, yes, sir.

Mr. Trier: I offer them in evidence.

(Papers marked Exhibits D. 4 to D. 13.)

Mr. Newman: May I object to the letters between this witness and his own client? Letters to the other parties I have no objection to.

Mr. Trier: Exhibits D. 4 and D. 6 come under the objection.

Mr. Newman: I have no objection to D. 4 and I have no objection to D. 6.

Mr. Trier: All the others are to the complainant or its representatives.

Q Now, will you tell us, in addition to this correspondence, what talk you had with the com-

plainant or with counsel concerning this mortgage —lease—proposition?

Mr. Newman: I object. That is a very general question. I don't know how he can answer that.

The Court: That is not up to you, how he can answer it, it is up to the witness. Objection overruled.

The Witness: I believe the last time I said something I referred to the mortgage of $100,000 in consideration of—(interrupted).

The Court: Answer the question.

The Witness: I wrote to Mr. Weisenfeld and told him that after consideration—(interrupted).

Mr. Trier: The letters are in evidence. I am speaking now of conversations that you had with the complainant or its representatives concerning in any way the mortgage end of this lease.

A In January—the early part of January, 1929, Mr. Newman called me on the phone and stated that he had negotiated for Mr. Weisenfeld a mortgage of $50,000 on the Jersey City property and that when the papers were prepared would I proceed to take the necessary corporate action to authorize the mortgage. This was followed by the receipt of a letter from Mr. Newman to me, formally advising me—(interrupted).

Q Do not tell us that. They are in evidence. Tell us the conversations which supplemented this letter or otherwise. A Having received—

The Court: You are a lawyer?

The Witness: Yes, sir. It is rather hard to try to sift out—(interrupted).

The Court: He is asking you the simplest question. When you have a witness on the stand you are very impatient if he should answer as you are answering now. Listen to the question and answer that.

The Witness: Having received Mr. Newman's letter, asking me to have executed the necessary corporate resolution and also an affidavit of good standing of the company, I took it up with the officers of the company and told them that that was what was wanted, and they told me that they would not sign those papers or take the corporate action without first having seen the proposed form of bond and mortgage submitted for execution. After having received from the Mutual Benefit Life Insurance Co. a letter stating the terms and conditions of their mortgage as they expected it, I made an appointment—(interrupted).

Q Did you have anything to say to the other side? Never mind your own side. I am asking you all conversations you had with the complainant or its representatives—any of them? A May I be permitted to testify as to the Mutual Benefit Life Insurance Co.?

The Court: Will you answer these questions?

Q I will ask you about the Mutual Benefit Life Insurance Co. all right. A Then afterwards, having received from Mr. Newman a further letter sending the proposed bond and mortgage,

again a certificate of standing, again a resolution to mortgage, and again an affidavit as to solvency, I took that up with my client.

The Court: Now you stop.

Q Tell us all the talk you had with Mr. Newman. A Mr. Newman. There were a few telephone talks. They were all along the line of having the mortgage—the proposed mortgage which was offered for execution—signed by my client, but until the time that I had seen the Mutual Benefit Life Insurance Co., of course I could tell him nothing definite. After I had seen the Mutual Benefit Life Insurance Co., I had nothing else to tell him but that my clients refused to sign the proposed bond and mortgage flat.

Q Did you tell him why? A I told him one reason, that the terms of the mortgage as I had seen it at the offices of the Mutual Benefit Life Insurance Co. were contrary to their understanding and intention and undertaking.

Q Now, will you tell us, have you talked with Mr. Alexander at the Mutual Benefit Life Insurance Co. when you went to see him on the appointment concerning which you have testified to?

Mr. Newman: I object.

The Court: What appointment?

Mr. Trier: He said after the exchange of the two letters from the Mutual Benefit Life Insurance Co., he made an appointment to go up to the Mutual Benefit Life Insurance Co. to look over the papers.

The Court: Objection sustained.

Q After you had been informed by the Mutual Benefit Life Insurance Co. and by Mr. New-

man of the terms of the proposed mortgage, did you go to see Mr. Sewell and Mr. Reich concerning it? A I went to see them.

Q Just say yes or no. A Yes, sir; I did.

Q Where did you see them? A At their offices in Jersey City.

Q And will you tell us what the conversation was about the mortgage?

Mr. Newman: I object to the conversation with Sewell and Reich concerning this mortgage and what it meant and its terms. Those are the gentlemen who were on the witness stand.

The Court: They represented who, Dr. Reich or somebody?

The Witness: Yes, sir; in the earlier transactions of the assignment.

The Court: This was at the time—(interrupted).

Mr. Newman: Just now; just a little while ago.

The Court: Objection sustained. Now, wait. No. Sewell was your witness. That is right.

Q Did you have any conversation with any one else other than your client concerning this proposed mortgage?

The Court: You know if he had. Lead him to it.

Q After the last letter which is in evidence which you sent to Mr. Newman and which was dated April 13, 1929, did you have a further conversation—telephone conversation—with him? A

Louis H. Holste, direct.

I called Mr. Newman's office up and in his absence left word with Mr. Kristeller that it was definite with my clients that they would not sign the proposed bond and mortgage—flat.

Q And that was when? A Why, as near as I can place it, it was around about the 15th of April, a day or so after having written the letter.

No cross examination.

LOUIS H. HOLSTE, sworn for the defendant.

Direct examination by Mr. Trier.

Q Mr. Holste, you are the treasurer of the J. J. H. Company? A I am.

Q And you were that at the time this lease was executed? A Yes, sir.

Q And have been ever since? A Yes, sir.

Q And your brother John is president? A Yes, sir.

Q And was so all the time? A Yes, sir.

Q And your brother Henry is secretary? A Yes, sir.

Q And was all the time? A Yes, sir.

Q And you three and Henry's wife have at all times been the directors and all the stockholders? A Yes, sir.

Q And you were present at Mr. Sewell's office at the time this lease was discussed? A Yes, sir.

Q And was there talk concerning the mortgage feature of the lease before the lease was executed? A Yes, sir.

Q And will you tell us what that was?

Mr. Newman: I object to that.

The Court: I will hear it under objection.

Q Proceed. A The question came up of erecting a building by Mr. Makaus and he said he didn't have enough cash to go through with it and to borrow money on an improvement he thought could not be done. He asked if we would assist him in procuring this money. We were told by Mr. Sewell, who acted as adviser at that time, that it would be necessary for us to help Mr. Makaus go through with this, that the loan that he would procure he would be responsible for and it would be paid off to the best of his ability; a certain percentage would be derived out of it to pay this mortgage off, so that our property, which was free and clear, would not have any encumbrances on it. The question came up as to what kind of a building would be erected and at that time, not knowing the conditions in Jersey City, we thought it would be at least $75,000, and if a little more, Mr. Makaus said he had enough to carry a little more than that. So we promised before the papers were drawn that we would swim along, assisting Mr. Makaus in this project of putting up a building.

Q Anything more of talk on that subject? A We were assured by Mr. Makaus at that time that there was nothing for us to worry about, that it would simply be a necessity that we would have to be just part of it with him.

Q Is that all you remember about it? A That is all I can recall.

Q Now, when did you next hear anything from the lessees or on behalf of the lessees concerning this mortgage feature of the lease? A I heard next from the people that procured the lease, or bought the lease from Dr. Reich.

Q And who was that? A That was Mr. Weisenfeld.

Q And how did you hear from him? A I can't just exactly say the date, but Mr. Weisenfeld called at my office—(interrupted).

Q Can you place it by the erection of the building? Was it before the building was erected or during the time or after? Perhaps you can place it that way. A There was no building up at this time.

Q Before the building was erected? A Yes, sir, before the building was erected.

Q Go ahead. A He stopped at my office and asked me if I could tell him where he could probably get a $50,000 mortgage at 5%.

The Court: Was that before he took the assignment or after?

The Witness: This is after he took the assignment, yes, sir.

The Court: Go on.

The Witness: I told him I didn't know and asked him if he had tried local banks. He said yes, they wanted more. He says, "You are pretty well acquainted in Newark," he said, "who will advise me who to see over there?" And I referred him to Mr. Schlittenhart, whom I felt was pretty well posted in banking circles in the City of Newark.

Q Is that all of that talk—I mean on the subject of the mortgage? A Yes, sir; that was all at that time.

Q Now, what is the next thing you heard? When I say heard, not only conversation, but letters, if you have any. A Shortly after Mr.

Weisenfeld called at my office and he said that they would—meaning his company—himself—they would like if we would permit them to get a hundred thousand dollar loan on the property, the land and improvements, as I understood it.

Q You mean, instead of fifty thousand? A Instead of fifty thousand, to raise it to a hundred thousand. I told him I would take it up with my brothers—I was not alone and I could not give him any answer on that.

Q Go on. Now, the next you heard? The next you heard or talks or letters? A Shortly after that I was walking on the Boulevard and I met Mr. Weisenfeld and Mr. Stein by accident.

Q What time was that with respect to the erection of the building? A The building was then pretty well constructed. The frame was up and brick work was up.

Q It was in the course of construction? A Yes, sir.

Q Go on and tell us the conversation, only so far as it concerns the mortgage. A Yes, sir. Mr. Stein and Mr. Weisenfeld both spoke about the increase to a hundred thousand dollars and Mr. Stein said that he would be glad to increase the rent a thousand dollars a year if we boys would agree to permit them to increase this to a hundred thousand dollars. I said that I couldn't give him any answer on that because, as I say, as I said before, I was alone in it and I couldn't speak for my brothers.

Q Go on. Is that all that was said at that time? A That is all that was said at that time.

Q Now, the next? A Shortly after that I received a letter.

Q From whom? A From Mr. Weisenfeld.

Q Have you that letter here? A I think I gave it to Mr. Schlittenhart.

Mr. Newman: It is in.

Q Then what did you do about that? A Do you want me to say what was in that letter?

Q No, it is in evidence. What you did. A I answered that letter and stated— (interrupted).

Q Have you a copy of that letter? A Stating we were not interested in that. You have that.

Q You answered it by letter? A Yes, sir.

Q Now, the next thing, either letter or conversation? A The next, I received a letter from Mr. Schlittenhart.

Q Yes. All right. A Pertaining to this mortgage, that he sent me an answer that he had given to Mr. Weisenfeld that we had also refused, because I had sent him then to Mr. Schlittenhart because we looked to him as our adviser.

Q You mean as to the $100,000 proposition? A As to the increase, yes, sir.

Q Go on. What next after that? A Shortly after I received a letter from Mr. Schlittenhart stating that he had been informed that an application had been made for a loan, but he didn't state from whom or I knew nothing about it, from whom the loan was to be gotten.

Q Have you that letter? A I think I have. I am not sure.

Mr. Newman: The letter is in.

Mr. Trier: I think so.

The Witness: I beg pardon, that is in answer to the letter I sent to Mr. Weisenfeld. I don't know if that is what you meant before. Here is the letter from Mr. Schlittenhart.

Mr. Newman: That is in, too—the copy is in.

Q Any other? A Well, right on top of that I got a letter with the name of the insurance company.

Q From whom was that letter? A That was copy of a letter from Mr. Schlittenhart.

Q Copy of a letter that he had received? A Yes, sir.

Q From some one on behalf of the other party. Now, did you have any further talk with the Journal Plaza Holding Co. or Mr. Weisenfeld or Mr. Newman on the subject at all? A No. I don't know Mr. Newman, no, sir.

Q You have told us all the talks you had with them or any of them on the subject? A Yes, sir; all I can recall, yes, sir.

Cross examination by Mr. Newman.

Q Mr. Holste, at the time you discussed the lease and about the mortgage, did you also know that you were to have the property, the improvement, building, after it had been erected—it was to be your property; did you understand that? A Why— (interrupted).

Q Did you understand it to be so? A I beg pardon?

Q Did you understand the building was to be your property after it was erected?

Mr. Trier: When?

Mr. Newman: At the expiration of the lease.

A At the expiration of fifty years?

Q Yes. A Yes, sir; fifty years.

John Holste, direct.

Q Did you also know that the lease contained a clause that the bond and mortgage would remain a lien on the demised premises and the improvements erected thereon—you saw that clause in the lease? A Yes, sir.

JOHN HOLSTE, sworn for defendant.

Direct examination by Mr. Trier.

Q You are the President of the J. J. H. Company? A I am.

Q And you were at the time that the lease was executed? A I was.

Q And you were at Mr. Sewell's office in Jersey City with your two brothers and Mr. Makaus, the proposed lessee, at the time of the drawing up of this lease, at the discussion just before the lease was executed? A I was.

Q And you had a discussion concerning the proposed lease? A Yes, sir.

Q As part of that discussion was there something about the proposed mortgage to be given under the lease? A There was.

Q And will you tell us what that was?

Mr. Newman: Subject to my objection. I object.

A A mortgage of $50,000 was spoken of at the time. We three, meaning my other brothers, including myself, expected at the time to go on a mortgage for $50,000 for Mr. Makaus.

Q That was discussed, was it? A That was discussed, yes, sir.

Q You understand what I want you to tell us is, what was talked over then. Go on. A It was understood between us that Mr. Makaus was to pay all expenses, irrespective of what the building would cost; we would only go on on the first mortgage of $50,000.

Q Do you remember any talk about the terms of the mortgage? A No; that I don't remember.

Q What do you mean—or can you tell us more explicitly what was said about Mr. Makaus standing all expenses, as you put it? What did you understand? What did you understand from the conversation?

Mr. Newman: I object.

Mr. Trier: I will withdraw it. Strike it out.

Q What was the detail as to the conversation as to the expenses, as you understand—as you remember? A The general expenses, the interest, and he was to pay all expenses, naturally, which—overhead expenses of any business property; in other words, we understand, or did understand at that time, that he was to pay the interest on the $50,000 and it was to be a first mortgage.

Q Did you have any understanding in that conversation as to who was to pay the principal?

Mr. Newman: I object to it as leading.

The Court: I will hear it.

A Of course, Mr. Makaus.

The Court: He wants to know whether you had an understanding.

The Witness: As I understood it, your Honor, we were to go on this mortgage, as I said before, and simply sign up, because we were afraid he might not be able to get the money on this ground.

Cross examination by Mr. Newman.

Q Did you understand that you were to get the building? A That we were to get the building?

Q Yes, the building was to be your property? A After the fifty years, possibly.

Q Well, didn't you know it said in the agreement that improvements made on the premises shall be the property of the lessor, subject to the lease? A After the fiftieth year.

Q Yes. And didn't you know that part of the money that you were taking on the mortgage was to go into the building? A That $50,000 was to go into the building, absolutely.

Q And was to be used for the purpose of erecting the building? A Yes, sir.

Q And that building was to be your property, wasn't it? A No, at the present time it wasn't.

Q It is today, isn't it? A No.

Q After fifty years? A After fifty years, possibly, and possibly not. There is a clause in there, I believe, twenty-five and twenty-five, making it a fifty-year lease.

Q So then, you would have had it at the end of twenty-five years, is that what you mean? A No, because you have the right to it another twenty-five years.

Q If we do not take the other twenty-five you would have it then? A I don't know

whether we would or not. I am no lawyer. I don't know.

Q Didn't you know there was a clause in the lease that the bond and mortgage should remain a lien on the demised premises and improvements thereon? Don't you remember that clause? A No, that is quite long and I don't remember the whole contents.

HENRY HOLSTE, sworn for defendant.

Direct examination by Mr. Trier.

Q Mr. Holste, you are the secretary of the J. J. H. Company? A I am.

Q And you were at the time the lease was executed? A Yes, sir.

Q And you were at Messrs. Sewell & Reich's office in Jersey City at the time that the proposed lease was talked over? A I was.

Q Just before the proposed lease was drawn up and finally executed? A I was.

Q And was there a discussion concerning the various terms of the lease? A Pardon me?

Q Was there a discussion concerning the various terms of the lease between you and your brothers and Mr. Weisenfeld? A Weisenfeld wasn't there.

Q Pardon me, Mr. Makaus and Mr. Sewell and Mr. Reich? A Yes, sir.

Q In that discussion was the proposed mortgage which finally was written into the lease talked over? A It was.

Q Now, tell us what was said.

Mr. Newman: I object. Taken subject to my objection.

Q All right. Now, go ahead. A Well, the conversation that was had about that mortgage was to the effect that we were to go on a $50-000 mortgage. That was the limit of the amount of money and it was my understanding— (interrupted).

Mr. Newman: I object to what his understanding was.

Q What was said, not what your understanding was. What was said? A Well, when the $50,000 mortgage was discussed, Mr. Sewell advised us—Mr. Sewell and Mr. Reich—it was in their office.

Mr. Newman: I object to what they were advised.

Q Was Makaus present? A And Mr. Makaus.

Q He was present when Sewell spoke to you about it—advised you? A Yes, sir.

The Court: Go on. What was said about the mortgage?

The Witness: Well, it was talked over and we were to go on the $50,000 mortgage to assist Mr. Makaus, to help him out, because it would have been hard for Mr. Makaus to obtain a mortgage on the improvements alone. So that we further stated at that conversation that we would go along with him temporarily and that he was to pay all the expenses and all the interest, in fact, everything else, so that we would have a clear profit on the rental of the ground.

Henry Holste, cross.

Q What was it that Mr. Sewell advised you in Mr. Makaus' presence? A Mr. Sewell advised us that we could certainly go along on that basis of going with Mr. Makaus on this mortgage and that Mr. Makaus would take care of the amortizing and payment of the mortgage, together with the interest.

Q Do you recall whether you were told at that time how long it would take for Mr. Makaus to amortize the mortgage? A No, sir; because at that time— (interrupted).

Q You have said no. That is all.

Cross examination by Mr. Newman.

Q Did you read the lease? A I did.

Q And did you know it was stated in the lease the bond and mortgage should remain a lien upon the demised premises and the improvements erected thereon? A I did.

Q You knew it also stated that the building and improvements made on the premises shall be the property of the lessor, subject to the lease? A I do.

Mr. Trier: With the exception of the witness in Arizona, that is all.

The Court: Who was he?

The Witness: He was the lessee at the time of the making of the lease.

The Court: Is there a cross-action here to re-form the agreement?

Mr. Trier: No. We are not seeking to re-form.

Discussion.

IN CHANCERY OF NEW JERSEY.

May 13, 1929.

Between

JOURNAL PLAZA HOLDING COMPANY,
Complainant,

and

J. L. H. COMPANY,
Defendant.

Continuation of hearing pursuant to adjournment at the place and in the presence of the parties as before.

Mr. Trier: I stated in answer to a question by the Court at the last hearing I was not praying relief by way of reformation. I now move to amend the answer to conform with the proof by setting forth that owing to a mistake of all the parties the lease did not accurately set forth the understanding between the parties. I move to amend as follows:

That the answer filed by the defendant in this cause be considered to be amended by having annexed thereto a counter-claim alleging that, by mistake of the parties to said lease, the following provisions of the lease, a copy whereof is annexed to the bill of complaint in this cause and made a part thereof, were inserted in said lease:

"That the said lessor shall permit the said lessee, his successors or assigns, to raise cash to an extent not to exceed two-thirds (2/3) of the value of the cost of said improvement,

which money is to be secured by a bond and mortgage to be executed by the lessor, its successors or assigns, and to be a lien upon the said demised premises, and the buildings and improvements thereon, that said two-thirds (2/3) of the cost of the said improvement is not to exceed the sum of Fifty Thousand ($50,000) Dollars; that the said bond and mortgage shall remain a lien upon the said demised premises and the improvements erected thereon;"

The actual understanding and intention of the parties to said lease being that instead of the aforesaid provisions thereof there should be inserted in said lease the following provisions:

"That the said lessor shall permit the said lessee, his successors or assigns, to raise cash to an extent not to exceed two thirds (2/3) of the value of the cost of said improvement, and not to exceed the sum of fifty thousand dollars, which money is to be secured by a bond and mortgage, not to exceed the sum of fifty thousand ($50,000) dollars to be executed by the lessor, its successors or assigns, and to be paid by the lessee, his successors or assigns, and to be a lien upon the said demised premises, and the buildings and improvements thereon; and that the said bond and mortgage shall remain a lien upon the said demised premises and the improvements erected thereon during the term of this lease, unless and until sooner paid by the lessee, his successors or assigns, as aforesaid;"

and praying that the said lease may be reformed by substituting for the aforesaid provisions at present appearing in said lease, as hereinbefore

first quoted, the provisions hereinbefore last quoted.

Mr. Newman: I would like to be heard.

The Court: I will reserve the matter. I will not rule on it now. It impresses me that this is really a bill for specific performance of a contract. If I should find, under the terms of the contract, that the tenant was to pay this off, I shall direct the lessor to sign a mortgage in the usual form—and I think these mortgages are in the usual form—but require security that this mortgage will be paid off. If I should find that it is the defendant's debt, then a mortgage in the usual form for the putting up of a building of this kind. Do you consent to that?

Mr. Newman: I am not content with that because I do not think that is the fact. Of course, if your Honor finds that to be the fact.

The Court: If I find that to be the fact both sides are content with it?

Mr. Newman: Yes. I am satisfied to have that disposition made.

The Court: Will the other side consent to that? If you are secured it is simply a vehicle —you cannot stand in the way, it seems to me, not fairly.

Mr. Trier: If I may take a moment to make our position clearer— (interrupted).

The Court: The case is one of specific performance and the Court will not order specific performance unless it can do so on equitable grounds—will not specifically enforce between the parties unless it can safeguard all parties.

Mr. Trier: Perhaps I need not say any more. The point on which we are basing our prayer for reformation is that the lessor was to mortgage his

land for $50,000, that sum to be paid off by the lessee. Now, on the complainant's prayer in his bill he has framed an entirely different mortgage, a mortgage for five years which at the end of five years we must pay off. That, of course, we object to.

The Court: That is out of your way if you are secured.

Mr. Trier: Anything that secures us.

The Court: I am going to let the testimony in which I put on record under objection, but only for the purpose of determining the question of specific performance. I will use it for that. I am not determining what the real bargain was. The defendant is being forced to performance and the surrounding circumstances may be introduced to determine whether it would be equitable, and for that reason the testimony as to what the real contract was may be offered, not to alter or change the contract.

I am going to let in as testimony that which was put on record under objection and which was excluded, for the purpose of determining whether, whatever the contract was, this case being a specific performance one, upon what terms it should be performed if it should be performed. It is not admitted and will not be considered for the purpose of changing or altering by oral testimony a written contract. It may be considered for the purpose, as already indicated, of determining whether under all the circumstances, specific performance will be allowed and if allowed upon what terms.

MATTHEW J. MAKAUS, sworn for defendant.

Direct examination by Mr. Trier.

Q Mr. Makaus, you are the lessee under the lease dated September 25, 1925, from the J. L. H. Company, Inc., to Matthew J. Makaus? A I am.

Q A copy of which is annexed to the bill of complaint in this case. And before that written lease was drawn up and signed were you and the three brothers Holste present at the office of Messrs. Sewell and Reich, in Jersey City? A We were.

Q And the proposed terms of the lease which you were to take were discussed? A They were.

Q And the proposed mortgage to be joined in by the lessors was discussed? A Yes, sir.

Q That was in the presence of Mr. Sewell and Mr. Reich and the three Holste brothers and yourself? A Yes, sir.

Q Now, will you tell us what the talk about the terms of that mortgage was?

Mr. Newman: I object on the grounds stated. I understand the purpose that your Honor is admitting it, but I desire to record my objection.

Q Go ahead on that. A It was the intention to construct a building on this plot of ground. A viaduct was being constructed across there at that time, not completed, and we were uncertain as to whether the property would face on the viaduct to give it store access or not. However, I did not have enough money at the time in order to construct any building. I talked the matter over with the Holste brothers and they agreed

that if I wanted to construct a seventy-five thousand dollar building, they would issue a bond and mortgage to the amount of fifty thousand dollars or two-thirds of the building, not to exceed $75,000, I in turn would repay this through amortization processes, either three or three and a half per cent a year, which would carry the extent of the lease for twenty-five years, before renewal.

Q Would that exhaust the mortgage? A It should be exhausted within that time, twenty-five years.

Q At the rate of three— (interrupted). A We didn't decide on any specific— (interrupted).

Q I mean at the rate of three or four. A Three or three and a half it would exhaust it before that time.

Cross examination by Mr. Newman.

Q Mr. Makaus, Mr. Sewell was your attorney in the matter, was he? A Mr. Sewell and Mr. Reich were presenting the proposition to me as a matter of investment—they were advising me as a matter of investment.

Q Yes. Did they represent you as lawyers or did they represent the Holstes at the time of the drawing of the lease? A They were—I believe they were representing the Holstes.

Q They brought the proposition to you? A They brought the proposition to me.

Q I see. And they represented the Holstes. Now, when the written lease was prepared did you read it over before you executed it? A I did.

Q And you recall now and you recalled at that time nothing was said in there as to who was to pay the mortgage, do you? A Well, it was understood.

Q I understand that. I say nothing was said in the written lease about it. A I recall it now, yes, sir.

Q And nothing was said about amortization in the written lease, was there? A No; there was nothing said in the lease about it.

Q And do you recall that it provides specifically in the lease that the mortgage was to remain a lien upon the land as long as the lease ran, do you remember that? A I remember that.

Q It says that the bond and mortgage shall remain a lien upon the demised premises and the improvements erected thereon. Do you remember that clause in the lease? A I believe I remember that.

Q Yes; and you realized, did you, at that time, that the written lease was entirely different from your verbal understanding, did you? A Well, I didn't realize it at that time, no, sir, due to the fact we had this conversation previous to it and we did not know just what condition this property would be in, and I understood I could not obtain a lease at the figure we received it from them and expect them to carry the bond and mortgage without us paying for it.

Q I see. But in any event, you had all these conversations before the written lease was drawn, isn't that so? A True.

Q And then after you had the conversations and talked the matter over, it was reduced to writing and you signed the lease? A I signed the lease.

Mr. Newman: All right. That is all.

SAMUEL B. WEISENFELD, sworn for complainant.

Direct examination by Mr. Newman.

Q You are a member of the bar of the State? A I am, sir.

Q And are you connected with the Journal Plaza Holding Co.? A I am, sir.

Q And what office do you hold there? A Secretary of the Journal Plaza Holding Co.

Q And Mr. Stein is what officer of the company? A He is President of the company.

Q Now, you dealt with Mr. Sewell at the time an assignment of this lease was taken over by the company, is that correct? A That is true, sir.

Q How did you come to get into that deal with Mr. Sewell, first? A Oh, Mr. Sewell and Mr. Reich knew me and we used to meet at the Y. M. C. A., Jersey City, between the hours of twelve and one.

Q Come right down to the details, please. A And they had been talking to me about a proposition that they were interested in opposite the Stratford Theatre which my father-in-law, Mr. Stein, had constructed in Journal Square, and they told me that it would be advisable and advantageous for us to reap the benefit of that improvement and would I interest Mr. Stein in buying the lease that they had on this particular property.

Q Where was this property with reference to the Stratford Theatre that Mr. Stein had built? A It was directly opposite and nearer to the Hudson Terminal.

Q Right at Journal Square? A At Journal Square, Jersey City.

Q Now, in your conversations with Mr. Sewell, in taking over the lease and negotiating for it, did you state as a fact to him, or rather, did he state as a fact to you, that this mortgage was to be amortized over a period of years and that it was to be paid for by the tenant of the property and three per cent would be paid off on the mortgage and the mortgage paid in a little over the first twenty-five years? A Never; absolutely not.

Q Was there anything said about amortizing at all in the conversation? A Yes, sir.

Q What was the reference to amortization, if any? A Amortization was figured on the basis of the cost of our improvement, for the building of it, this particular proposition that we contemplated building on the land.

Q Amortization of what? A Amortization of the improvement.

Q Nothing with respect to the amortization of the mortgage? A No, sir.

Q And what was the discussion with reference to the amortization of the building? A We discussed it in writing and they tried to show me that it would be a good investment. They figured and I figured that the cost of the building would be about seventy-five thousand dollars. I said, "Well, let's not figure so close; we want to construct a nice building there, a building that will look well for Journal Square; let us figure on the basis of a hundred thousand dollars"—and with the cost of the lease, we having paid to them $25,000, our total cost for the improvement would be about a hundred and twenty-five thousand dollars, and one of the inducements held out to us— (interrupted).

Q No. What was said? A It was said that we would be permitted to receive back $50,000 on

first mortgage that the Holstes would execute upon this land and which would be a lien upon the land and our net cost would be about $75,000. The amortization was figured that it would cost us about $1,500 a year for all the entire time of the lease, fifty years, on the basis of $75,000 net, the cost of our improvement.

Q That was all that was said with reference to the matter? A Yes, sir.

Cross examination by Mr. Trier.

Q You saw by the lease itself that the building was not to exceed $75,000?

The Court: You read the lease?

The Witness: I read the lease, yes, sir.

Q Well, you say you were figuring at a hundred thousand dollars?

The Court: That's what he said.

TESTIMONY CLOSED.

Exhibit C. 1.

EXHIBIT C. 1.

THIS INDENTURE made this twenty-fifth day of September, in the year of our Lord One thousand nine hundred and twenty-five.

Between *J. L. H. COMPANY, INCORPORATED,* a corporation of the State orf New Jersey, hereinafter designated as the Lessor, and *MATTHEW J. MAKUS,* of Caldwel, in the County of Essex and State of New Jersey, hereinafter designated as the Lessee:

WITNESSETH:

That the lessor, in consideration of the rents hereinafter reserved, and of the covenants and agreements on the part of the lessee hereinafter contained by these presents, does demise and lease unto the said lessee, and the said lessee does hereby take and hire from the lessor, the following property hereinafter called the demised premises, to wit,: the land and building known as Nos. 649-651 Pavonia Avenue, Jersey City, bounded and described as follows:

All those two certain lots, tracts, pieces or parcels of land and premises, situate, lying and being in Jersey City, in the County of Hudson, and State of New Jersey, and which upon a certain map entitled "Map of Property formerly the Tonnele Homestead, Hudson City, New Jersey, belonging to Robert C. Bacot" filed in the office of the Clerk (now Register) of said county of Hudson, May 13th, 1864, are known, laid down and designated as lots numbered One hundred and two (102) and one hundred and three (103) fronting on the southerly side of Pavonia Avenue (formerly Prospect Avenue) each of said lots being twenty-five feet (25 feet) wide in front and rear, and one

Exhibit C. 1.

hundred and twenty-five feet (125 feet) deep throughout.

Being the same premises conveyed to David Crichton (widower) of the City of Jersey City, County of Hudson and State of New Jersey, by Francis S. Wetmore, Executor and Cecile J. Lockwood Executrix of the last will and testament of Francis G. Wetmore deceased, and Daniel H. Lockwood, husband of said Cecile J. Lockwood, by deed dated June 21st 1893, and recorded in the Register's Office of Hudson County aforesaid in Book 579 of Deeds, page 214 etc.

And also being the same premises conveyed to Adele Holste of Jersey City, County of Hudson and State of New Jersey, by David Crichton, (widower) by Deed dated August 30th 1897 and recorded in the Register's office of Hudson County aforesaid, and in Book 677 of Deeds and on page 644 etc.

And being the same premises conveyed to Henry Holste, party of the first part, aforesaid, by the last will and testament of Adele Holste, deceased, late of Jersey City, Hudson County, New Jersey, filed in the Surrogate's Office, April 10th, 1923.

TO HAVE AND TO HOLD the said premises for the term commencing on the first day of October, 1925, and ending at 12 o'clock noon on the 30th day of Steptember, 1950, unless sooner terminated as hereinafter provided, at the net rental as follows:

For the first year, three thousand dollars ($3,000)

For the second year, six thousand dollars ($6,000)

Exhibit C. 1.

For the third, fourth and fifth years, seven thousand five hundred dollars ($7,500) per annum.

For the sixth, seventh, eighth, ninth and tenth years, nine thousand dollars ($9,000) per annum.

For the eleventh, twelfth, thirteenth, fourteenth and fifteenth years, ten thousand five hundred dollars ($10,500) per annum.

For the sixteenth, seventeenth, eighteenth, nineteenth and twentieth years, twelve thousand dollars ($12,000) per annum.

For the twenty-first, twenty-second, twenty-third, twenty-fourth and twenty-fifth years, twelve thousand five hundred dollars ($12,500) per annum.

All of which rent shall be payable in equal quarterly instalments, except the first year's rent, which shall be paid on the execution of this lease; the said quarterly instalments of rent being due on the first days of October, January, April and July in each year.

It is hereby mutually covenanted and agreed and it is the intention of these presents, that the lessor shall receive the said rent free of taxes, which by the terms of this lease, are made payable by the lessee, his successors and assigns.

The covenants, provisions and agreements hereinafter contained shall in every case apply to, be binding upon, and enure to the benefit of the respective parties hereto, their respective successors, administrators and assigns.

It is further stipulated and agreed by the parties hereto, that should the lessee, his successors or assigns, fail to pay said stipulated rents, on or before the specified days, or within ten days thereafter, that this lease and all their rights and interest in said premises shall be terminated, and the lessor shall enter and take

Exhibit C. 1.

possession of the said premises, terminating this lease.

It is further agreed that the said lessee, his successors or assigns, shall pay all taxes and water rents within ninety days after the same become due.

The lessee hereby agrees to indemnify and save harmless the said lessor from and against any and all claims, suits, actions, damages, or causes of action arising during the term of this lease, for any personal injury, loss of life or damage to property sustained in or about the demised premises or the buildings and improvements thereon, or the appurtenances thereto or upon the adjacent sidewalks or streets, and from and against all costs, counsel fees, expenses and liabilities incurred in and about any such claim, the investigation thereof, or the defense of any action or proceeding brought thereon, and from and against any orders, judgments and decrees which may be entered therein.

During the term of this lease, the said lessee, his successors and assigns, at his own expense, shall keep all buildings, structures and equipment, in or appurtenant to the said premises, insured for the benefit of the lessor, against loss or damage by fire, in such insurance company as shall be satisfactory to the lessor.

That the lessee during the term of this lease shall at his own expense provide and keep in force for the benefit of the lessor, a general liability policy, protecting the lessor against any and all liability occasioned by accident or disaster, and a Workmens Compensation policy, covering the workmen engaged in the altering or construction of any building or buildings on the demised premises.

Exhibit C. 1.

Throughout the term of this lease, the lessee shall also at his own expense provide and keep in force for the benefit of the lessor, plate glass insurance covering the glass in the said demised premises.

That should the said lessee, his successors or assigns, fail or neglect to obtain such policies, the said lessor shall have the right to take out such insurance policies and charge the cost of obtaining the same to the lessee, and his successors or assigns.

If the demised premises or any building or improvement thereon, or hereafter erected thereon, shall, during the term of this lease be destroyed in whole or in part by fire, or other cause, the same may be promptly repaired, rebuilt or replaced by the lessee, the moneys received from any and all insurance companies because of the destruction or damage to the said building or buildings, to be applied by the lessor to the expense and cost of the repairing, replacing and rebuilding of the same by the lessee.

The lessor does hereby agree and authorize the lessee at any time during the term of this lease to tear down the buildings now occupying said demised premises, and to erect a building, the plan thereof to be chosen and decided upon by the lessee upon the said demised premises. That the said lessor shall permit the said lessee, his successors or assigns to raise cash to an extent not to exceed two-thirds (2/3) of the value of the cost of said improvement, which money is to be secured by a bond and mortgage to be executed by the lessor, its successors or assigns, and to be a lien upon the said demised premises, and the buildings and improvements thereon. That said two-thirds of the cost of the said improvement is not to exceed the sum of fifty

Exhibit C. 1.

thousand dollars ($50,000); that the said bond and mortgage shall remain a lien upon the said demised premises and the improvements erected thereon.

It is further agreed that the lessee shall pay all interest on the said mortgage, so raised during the term of this lease, or the term of the said bond and mortgage, said interest to be paid within thirty days from the due date.

It is further agreed that the improvements so made on the said premises shall be the property of the lessor, subject to this lease.

In the entering of this lease, the parties hereto have in mind the fact that the Bridge being constructed across the Pennsylvania Railroad Cut at the Hudson County Boulevard shall be so constructed and finished that the sidewalks or other walk on and along the easterly side of the Hudson County Boulevard in front of the demised premises, shall be so constructed and laid out that it will face the entire westerly side of the demised premises, on to and immediately adjacent to the said sidewalk, so that ingress and egress shall be possibel and practical directly from the sidewalk so constructed on and along the entire westerly side of the said demised premises. In the event that the said sidewalk and approach is not in the aforesaid position, and such ingress and egress is not practical directly from the said sidewalk of the easterly side of the Hudson County Boulevard in and to the entire westerly side of the said demised premises, then said lessee shall have the option and privilege of terminating this lease, by serving written notice upon the lessor of his intention so to do, the terminating of said lease to take place immediately upon the service of such notice. That should the lessor be holding any monies as

Exhibit C. 1.

security for the lessee, the said sum upon the terminating of the said lease shall be repaid to the lessee, his successors or assigns, by the lessor.

That from the 1st day of October, 1925, the lessor shall collect the rents from the tenants now occupying the present buildings on demised premises or from such persons as who might in the future occupy the present buildings on the demised premises, and shall continue to collect the said rents until the said premises are vacated voluntarily by the tenants, or through the action of the lessee, his successors or assigns, or until said buildings are torn down or removed by the lessee; and shall hold the said rents so collected, after deducting reasonable expense for the collection thereof, for the benefit of the lessee, for the following purpose— That should the lessee tear down or remove the building or buildings now provided in this lease, erected on the said demised premises, then the moneys so collected shall become the property of the lessor, the sum to be considered as liquidated damages for the destruction of the said building, however, upon the completion of the building or buildings as provided in this lease, after the tearing down or removal of the buildings now on said demised premises, the said moneys so collected shall be paid to the lessee, his successors or assigns.

That the lessee, his successors or assigns, shall have the right to sublet or sublease the whole or any portion of demised premises for the term of this lease, or any part thereof.

It is hereby agreed by the parties hereto that after the erection and completion of the improvements proposed and agreed to by this lease. that should the lessee desire to make any altera-

Exhibit C. 1.

tion in the said building he is hereby authorized to do so, however, at his own expense and cost, and should the lessee after the erection and completion of the said improvements proposed in this lease, desire to raze the said building he is authorized to do so, at his own cost and expense, and with no cost to the lessor. This however, to in no way conflict with the other terms of this lease.

It is further agreed that at the expiration of the term hereby demised, if this lease shall be in full force and effect the lessor will, at the option of the lessee, grant unto the lessee a new lease of the demised premises for a further term of twenty-five years from the date of the expiration of this lease, at the annual rental of twelve thousand five hundred dollars ($12,500), in addition to the taxes, insurance premiums and other payments required under the terms of this lease. Said renewal lease shall contain covenants and conditions similar to those contained in this lease. If the lessee shall desire to elect to renew this lease, he, his successors or assigns, shall notify the lessor of such intention in writing on or before the first day of April, nineteen hundred and fifty.

IN WITNESS WHEREOF, the party of the first part has caused its corporate seal to be hereto affixed and attested by its secretary, and these presents to be signed by its president, and the party of the second part has hereunto affixed his hand and seal this twenty-fifth day of September, nineteen hundred and twenty-five.

J. L. H. COMPANY INCORPORATED

By JOHN L. HOLSTE

President

Attest:

HENRY E. HOLSTE.

Secretary

Exhibit C. 1.

MATTHEW J. MAKAUS. (L. S.)

Signed, sealed and delivered
in the presence of

WILLIAM E. SEWEL
Master in Chancery of New Jersey

STATE OF NEW JERSEEY }
COUNTY OF HUDSON } *ss.*

BE IT REMEMBERED that on this twenty-fifth day of September, nineteen hundred and twenty-five, personally appeared HENRY E. HOLSTE, who being by me duly sworn doth depose and make proof to my satisfaction that he is the Secretary of, and well knows the Corporate Seal of J. L. H. COMPANY, INCORPORATED, the grantor named in the foregoing Lease, that the seal thereto affixed is the roper corporate seal of the said corporation, and that the same was so affixed thereto, and the said Deed signed and delivered by John L. Holste, president of said corporation, in the presence of said deponent, as the voluntary act and deed of said corporation, and that the deponent thereupon subscribed his name as witness.

WILLIAM E. SEWEL
Master in Chancery of New Jersey

Exhibit C. 1.

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

BE IT REMEMBERED, that on this twenty-fifth day of September, nineteen hundred and twenty-five, in the year of our Lord, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared MATTHEW J. MAKAUS, who I am satisfied is one of the parties in the within Indenture 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.

WILLIAM E. SEWEL
Master in Chancery of New Jersey

INDENTURE OF LEASE

Between

J. L. H. COMPANY INCORPORATED

and

MATTHEW J. MAKAUS

Dated—September 25, 1925

Received in the Register's Office of the County of Hudson N. J. at 3:17 o'clock P. M. March 11-1926 and Recorded in Book 1594 of Deeds for said County on page 602 etc.

Charles F. X. O'Brien
Register

Exhibit C. 2.

EXHIBIT C. 2.

KNOW ALL MEN BY THESE PRESENTS: That I, MATTHEW J. MAKAUS for and in consideration of the sum of One Dollar ($1) and other good and valuable considerations lawful money of the United States, to me duly paid, by ANDREW J. M. REICH, of the Town of West New York, County of Hudson and State of New Jersey, have sold and by these presents does grant, convey, assign, transfer and set over, unto the said ANDREW J. M. REICH, Indenture of Lease, bearing date the twenty-fifth day of September in the year one thousand nine hundred and twenty-five, made by J. L. H. COMPANY, INCORPORATED to MATTHEW J. MAKAUS, with all and singular the premises therein mentioned and described, and the buildings thereon together with the appurtenances. TO HAVE AND TO HOLD the same unto the said ANDREW J. M. REICH, his heirs, successors or assigns, from the 14th day of February for and during all the rest, residue and remainder yet to come of and in term of twenty-five years mentioned in the said Indenture of Lease, and also the further term of twenty-five years, as privilege or renewal, as provided in said lease, and all other privileges and rights therein, subject nevertheless to the rents, covenants, conditions and provisions therein also mentioned. And I do hereby covenant, grant, promise and agree, to and with the said ANDREW J. M. REICH that the said assigned premises now are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments and incumbrances whatsoever.

Exhibit C. 2.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 14th day of February one thousand nine hundred and twenty-seven.

MATTHEW J. MAKAUS (L. S.)

Signed, sealed and delivered
in the presence of:

WILLIAM L. SEWELL

ASSIGNMENT OF LEASE.

MATTHEW J. MAKAUS

to

ANDREW J. M. REICH.

Dated: February 14th, 1927

Received in the office of the Register of the County of Hudson at 10:49 A. M. o'clock July 14th, 1927, and recorded in Book 1649 of Deeds for said County on page 574 &c.

CHARLES F. X. O'BRIEN
REGISTER.

Exhibit C. 3.

EXHIBIT C. 3.

KNOW ALL MEN BY THESE PRESENTS, that I, ANDREW J. M. REICH, of the Town of West New York, County of Hudson and State of New Jersey, in consideration of One ($1) Dollar and other good and valuable consideration to me in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over unto SAMUEL B. WEISENFELD, of the City of Jersey City, County of Hudson and State of New Jersey, his heirs, executors, administrators and assigns, a certain indenture of Lease made by J. L. H. Company, Inc., to Matthew J. Makaus, dated September 25, 1925 and recorded in Book 1594 of Deeds, page 602, which lease is assigned by assignment of lease from Matthew J. Makaus to Andrew J. M. Reich, dated February 14, 1927 and recorded in book 1649 of Deeds, page 574, and all that messuage described therein, which lease covers the premises described as follows:

ALL those two certain lots, tracts or parcels of land and premises, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, which upon a certain map entitled "Map of Property formerly the Temple Homestead, Hudson City, New Jersey, belonging to Robert C. Bacot, 1864" filed in the Office of the Clerk (now Register) of Hudson County, May 13, 1864, are known, laid down and designated as lots numbers one hundred and two (102) and one hundred and three (103), fronting on the southerly side of Pavonia Avenue (formerly Prospect Avenue), each of said lots being twenty-five (25) feet wide in front and rear and one hundred and twenty-five (125) feet deep throughout.

Exhibit C. 3.

with the appurtenances and also all my estate, right, title, term of years yet to come, claim and demand whatsoever, of, in, to or out of the same to have and to hold the same, unto the said party of the second part, his executors, administrators or assigns, for the residue of the term therein mentioned; subject, nevertheless to the rents, covenants, conditions and provisions therein also mentioned. And I do hereby covenant and agree to and with the said Samuel B. Weisenfeld that the said assigned premises now are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments and encumbrances whatsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 13th day of October, nineteen hundred and twenty-seven.

ANDREW J. M. REICH (L. S.)

Signed, sealed and delivered
in the presence of:

DAVID M. KLAUSNER.

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

BE IT REMEMBERED, That on this 14th day of October in the year of our Lord One Thousand Nine Hundred and twenty-seven, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared ANDREW J. M. REICH, who, I am satisfied, is the person mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that, he signed, sealed and de-

Exhibit C. 3.

livered the same as his voluntary act and deed, for the uses and purposes therein expressed.

DAVID M. KLAUSNER
Master in Chancery of N. J.

ASSIGNMENT OF LEASE

ANDREW J. M. REICH

to

SAMUEL B. WEISENFELD.

Dated: October 13th, 1927.

Received in the office of the Register of the County of Hudson, N. J. at 1:39 o'clock, P. M. October 14th, 1927, and recorded in book 1666 of Deeds for said County on page 179 &c.

CHARLES F. X. O'BRIEN
REGISTER.

EXHIBIT C. 4.

KNOW ALL MEN BY THESE PRESENTS, that I, SAMUEL B. WEISENFELD of the City of Jersey City, County of Hudson and State of New Jersey, in consideration of One ($1) Dollar and other good and valuable consideration to me in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over unto JOURNAL PLAZA HOLDING CO., a corporation of the State of New Jersey, its successors and assigns, a certain indenture of lease made by J. L. H. Company, Inc., to Matthew J. Makaus, dated September 25, 1925, and recorded in Book 1594 of Deeds, page 602, which lease was assigned by assignment of lease from Matthew J. Makaus to Andrew J. M. Reich, dated February 14, 1927 and recorded in Book 1649 of deeds, page 574, and which lease was assigned by Andrew J. M. Reich to Samuel B. Weisenfeld, dated October 13th, 1927 and recorded in Book 1666 of deeds page 179, and all that messuage described therein, which lease covers the premises described as follows:

> ALL those two certain lots, tracts or parcels of land and premises, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, which upon a certain map entitled "Map of property formerly the Tonnelle Homestead, Hudson City New Jersey, belonging to Robert C. Bacot, 1864" filed in the office of the Clerk (now Register) of Hudson County, May 13, 1864 are known, laid down and designated as lots numbers one hundred and two (102) and one hundred three (103) fronting on the southerly side of Pavonia Avenue

Exhibit C. 4.

(formerly Prospect Avenue) each of said lots being twenty-five (25) feet wide in front and rear and one hundred and twenty-five (125) feet deep throughout.

with the appurtenances and also all my estate, right, title and term of years yet to come, claim and demand whatsoever, of, in, to or out of the same, to have and to hold the same, unto the said party of the second part, its successor or assigns, for the residue of the term therein mentioned; subject, nevertheless, to the rents, covenants, conditions and provisions therein also mentioned. And I do hereby covenant and agree to and with the said Journal Plaza Holding Company that the said assigned premises are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments and encumbrances whatsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this tenth day of July, Nineteen Hundred and twenty-eight.

SAMUEL B. WEISENFELD

Signed, sealed and delivered
in the presence of

ELSIE M. HEISE

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

BE IT REMEMBERED, That on this tenth day of July in the year of our Lord One Thousand Nine Hundred and twenty-eight, before me, the subscriber, Notary Public of New Jersey personally appeared Samuel B. Weisenfeld who, I am satisfied, is the person mentioned in the within

Exhibit C. 4.

Instrument, to whom I first made known the contents thereof, and thereupon he asknowledged that, he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

ELSIE M. HEISE
Notary Public of New Jersey

ASSIGNMENT OF LEASE

SAMUEL B. WEISENFELD

to

JOURNAL PLAZA HOLDING COMPANY.

Dated: July 10th, 1928

Received in the office of the Register of the County of Hudson, N. J. at 12:49 o'clock P. M. August 6, 1928 and recorded in book 1689 of Deeds for said County on page 262 etc.

CHARLES F. X. O'BRIEN
REGISTER


WORCESTER
IODIZED
SALT
Prevents Simple goiter
For table and cooking
IVORY SALT, if you prefer
THE WONDER STORES
Downtown's Foremost Department Store
Quality - Value - Service
PLAZA
TEA GARDEN
RESTAURANT
AMERICAN
CHINESE
FOOD
CHOP SUEY
BILLIARD
ACADEMY

Exhibit C. 7.

EXHIBIT C. 7.

Law Offices
SAMUEL B. WEISENFELD
Union Trust Co. Bldg.
75 Montgomery Street
Jersey City, N. J.
Telephone 626 Montgomery

November 9, 1928.

Mr. Holste,
372 Mercer St.,
Jersey City.

Dear Mr. Holste:—

We are about to make arrangements to raise a mortgage as is provided in our Lease and would suggest that you make arrangements to pay off the small mortgage which is a lien upon the property.

I would not like to have this mortgage show up in the examination of title.

You have promised upon numerous occasions to take care of this matter, but to date nothing has been done. Kindly give this matter your prompt attention.

Very truly yours,

SAMUEL B WEISENFELD

SBW/R

Exhibit C. 8.

EXHIBIT C. 8.

December 31st, 1928.

J. H. L. Co., Inc.,
Att: Mr. Louis Holste,
372 Mercer Street,
Jersey City, N. J.

Dear Mr. Holste:—

I am herewith enclosing you check for $1875. payment of rent for period January 1st, 1929 to March 31st, 1929, for property 2920 Hudson Boulevard, Jersey City.

Would you kindly advise me immediately as to the proposition submitted to your Mr. Schlittenhart. Are you willing to accept $1000. additional rental per annum for the privilege to increase our mortgage to $100,000.

You might also let me know what is your lowest figure for the sale of said property.

Wishing you a very happy New Year, I am

Very truly yours,

SAMUEL B WEISENFELD

SBW/R
Encl.

Exhibit C. 9.

EXHIBIT C. 9.

John L. Holste Louis H. Holste
Henry E. Holste

J. L. H. COMPANY, INC.
Office: 372 Mercer Street
Jersey City, N. J.

Jan. 5, 1929

Mr. Samuel Weisenfeld,
75 Montgomery St.,
Jersey City, N. J.

Dear Mr. Weisenfeld:

Received your check amounting to $1875 in payment of lease rent from Jan. 1, 1929 to Mar. 31, 1929 for which accept thanks. As to the proposition of an additional $1000 rental per annum, wish to state that we are not interested. As to a price for the property, would say that you make an offer which would be submitted.

As to myself, I do not see my brothers together very often but would make it a point to try and get them together upon receipt of your communication.

Trusting the year will be full of prosperity and good luck, we are

Very truly yours,

LOUIS H. HOLSTE

Exhibit C. 10.

EXHIBIT C. 10.

Telephone Mulberry 3203

HENRY SCHLITTENHART
Attorney and Counsellor at Law
Grad Building
1023 Broad St., Newark, N. J.

January 11, 1929.

Samuel B. Weisenfeld, Esq.,
75 Montgomery St.,
Jersey City, N. J.

My dear Mr. Weisenfeld:—

I called your office and was sorry to learn of your illness and trust that you are much improved by this time.

I understand that the Holstes have communicated directly to you the information that they would not be interested in an increased rental of $1,000. in consideration for the raising of a mortgage of $100,000. I further understand that they are to have a meeting for the purpose of considering their sale price. Should I hear from them, I will communicate with you directly.

Very truly yours,

HENRY SCHLITTENHART

HS:B.
#119.

Exhibit C. 11.

EXHIBIT C. 11.

Law Offices
SAMUEL B. WEISENFELD
Union Trust Co. Bldg.
75 Montgomery Street
Jersey City, N. J.
Telephone 626 Montgomery

January 18th, 1929.

Henry Schlittenhart, Esq.,
1023 Broad Street,
Jersey City, N. J.

Dear Mr. Schlittenhart:—

We have obtained a mortgage loan of $50,000. on our property from the Mutual Benefit Life Insurance Company of Newark, N. J.

The N. J. Title Guarantee and Trust Co., is making the search on said property for said loan and just as soon as they are ready we will arrange an appointment for the J. L. H. Co., Inc., to execute the bond and mortgage for said loan.

Journal Plaza Holding Co.,

By Samuel B. Weisenfeld
Secretary.

SBW/R

Exhibit C. 12.

EXHIBIT C. 12.

Jacob L. Newman
Lionel P. Kristeller
Saul J. Zucker
Counsellors at Law
Telephone Market 5721

810 Broad Street
Newark, N. J.

February 16, 1929.

Mr. Henry Schlittenhart
1023 Broad St.
Newark, N. J.

Dear Mr. Schlittenhart:

Confirming my telephone conversation with you, I herewith enclose certificate of the secretary of the J. L. H. Company, Inc., certifying as to the resolution authorizing the execution of the $50,000.00 mortgage by J. L. H. Company, Inc.

This is the matter about which Mr. Newman spoke to you sometime ago relative to the company which you represent joining in the mortgage to the Mutual Benefit Life Insurance Co.

Will you also take up with your clients, and arrange to have receipted for cancellation, the $2,000.00 mortgage now held by Almira Heritage? The mortgage to be delivered to the Mutual Benefit Life Insurance Co. is to become due and payable within five years.

I am also enclosing a proof of corporate standing, which I shall also appreciate your having executed by the Secretary of the J. L. H. Company, Inc.

If there is any further information that I can give you, please let me hear from you at once.

Exhibit C. 13.

Thanking you for your courtesy in this matter, I remain,

Yours truly,

J. L. NEWMAN.

Z:G
Enc.

EXHIBIT C. 13.

CERTIFIED COPY OF RESOLUTION TO MORTGAGE.

"RESOLVED, that this Company mortgage its land at the southeast corner of Hudson Boulevard and Pavonia Avenue, Jersey City, New Jersey, for the sum of Fifty Thousand Dollars ($50,000.00), upon terms, and that our President be authorized to execute this company's mortgage to the mortgagee, THE MUTUAL BENEFIT LIFE INSURANCE CONPANY, and to affix the company's seal thereto."

This is to CERTIFY, that the foregoing is a true copy of a Resolution passed by the Board of Directors of the J. L. H. COMPANY, INC., at a meeting of said Board, held on at which a quorum was present, as the same appears on the Minute Book of the Company.

IN WITNESS WHEREOF, I have hereunto signed my name as Secretary, and affixed the seal of said Company.

.....
Secretary of J. L. H. COMPANY, INC.

Signed, sealed, and delivered:
in the presence of:

Exhibit C. 13.

No.....

CERTIFICATE OF GOOD STANDING

To the Mutual Benefit Life Insurance Company of Newark, New Jersey:—

I, Secretary of J. L. H. Company, Inc. do hereby certify that the above is the legal corporate name of the corporation which owns the land at southeast corner of Hudson Boulevard and Pavonia Ave Jersey City, N. J. described in mortgage in sum of $50,000.00 about to be executed and delivered to Mutual Benefit Life Insurance Company that it is a corporation of the State of New Jersey; that its principal office is at that the said corporation is not in the hands of a receiver; that no application for receivership for said company is pending; that said company has not changed its name;
that no petition in bankruptcy has been filed by or against it, neither has it committed any act of bankruptcy; that its charter has not expired, neither has it been forfeited for non-payment of taxes or otherwise, and that said corporation has not been dissolved.

In Witness Whereof, I have hereunto signed my name as Secretary, and affixed the seal of said this Day of February 1929.

Secretary.

Exhibit C. 14.

EXHIBIT C. 14.

Telephone Mulberry 3203

HENRY SCHLITTENHART
Attorney and Counsellor at Law
Grad Building
1023 Broad St., Newark, N. J.

February 18, 1929.

Jacob L. Newman, Esq.,
Counsellor-at-Law,
810 Broad Street,
Newark, N. J.

Dear Mr. Newman:—

I am in receipt of your letter of February 16th regarding mortgage of $50,000.00 on the property of my client, J. L. H. Company, Jersey City, N. J. I have communicated the contents of your letter and request to them and will let you hear further from me as soon as I hear from them.

Very truly yours,

H. SCHLITTENHART.

HS:B.
#119.

Exhibit C. 15.

EXHIBIT C. 15.

Jacob L. Newman
Lionel P. Kristeller
Saul J. Zucker
Counsellors at Law
Telephone Market 5721

810 Broad Street
Newark, N. J.

April 9, 1929.

Mr. Henry Schlittenhart
1023 Broad St.
Newark, N. J.

Re: Boulevard & Pavonia Avenue,
Jersey City, N. J.

My dear Mr. Schlittenhart:

I am handing you herewith bond and mortgage from J. L. H. Company, Inc., to The Mutual Benefit Life Insurance Company, to secure the sum of $50,000.00, on the property belonging to them, at the above address, in accordance with the lease made by them to the Journal Plaza Holding Co.

I wish you would see that the bond and mortgage are executed promptly, and also that the affidavit herewith enclosed, is executed by John L. Holste, and also have the resolution of the Secretary of the J. L. H. Company, Inc., properly filled out and sworn to by the Secretary.

I think it would be wise also to have the resolution certified to by the Secretary, authorizing the execution of this mortgage.

If you will see that this is attended to and returned to me, at once, together with the mortgage of $2,000.00 now a lien upon your property, properly receipted for cancellation, I shall appreciate it.

Exhibit C. 15.

I also have a collateral bond made by Mr. Stein, to The Mutual Benefit Life Insurance Company, conditioned for the payment of the obligation which the J. L. H. Company, Inc. is about to enter into, the execution of which I shall attend to.

I am also enclosing an authorization to the mortgagee, directing them to pay the proceeds of the mortgage to me as attorney for Journal Plaza Holding Co.

This matter has been pending for a long time, and patience has ceased to be a virtue. If your clients, for any reason, are unwilling to execute these papers, and complete this matter, please notify me within the next 48 hours, or deliver the papers, properly executed, and let us consummate the transaction. If I do not have the papers returned to me within the above time, properly executed, together with the cancelled mortgage, I shall advise my client of the situation, and start such legal proceedings on their behalf, as I think equitable and proper.

I trust this, however, may not be necessary, but await to hear from you further with regard to the matter.

Yours very truly,

JACOB L. NEWMAN.

N:G
Enc.

Exhibit C. 16.

EXHIBIT C. 16.

KNOW ALL MEN BY THESE PRESENTS, That

J. L. H. COMPANY, INC.

a corporation organized and existing under the laws of the State of New Jersey, hereinafter called the obligor, is held and firmly bound unto THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation organized and existing under the laws of New Jersey, having its principal office in the City of Newark, in the County of Essex and State of New Jersey, in the sum of

ONE HUNDRED THOUSAND DOLLARS

lawful money of the United States of America, to be paid to the said THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, or to its certain Attorney or Attorneys, Successors or Assigns; for which payment well and truly to be made it binds itself and its successors firmly by these presents. Sealed with its Common Seal, and Dated the

day of April, in the year of our Lord One Thousand Nine Hundred and Twenty-nine.

THE CONDITION OF THIS OBLIGATION IS That if the above bounden

J. L. H. COMPANY, INC.

its successors or assigns shall and do well and truly pay or cause to be paid, unto the said THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, or to its certain Attorney or Attorneys, Successors or Assigns, the just and full sum of

FIFTY THOUSAND DOLLARS

lawful money aforesaid, on the first day of April One Thousand Nine Hundred and Thirty-

Exhibit C. 16.

four, with interest for the same at the rate of five and one-half per cent. per annum, on the first day of October and April without any fraud or other delay, and shall and do well and truly perform and keep all the agreements herein set forth, then this obligation to be void, or else to be and remain in full force and virtue.

AND IT IS HEREBY EXPRESSLY AGREED, That the obligor herein, its successors and assigns will not claim or demand or be entitled to receive any credit or credits on the interest payable hereon for so much of the taxes assessed against the lands and premises described in the mortgage accompanying this bond as is equal to the tax rate applied to the amount due on the said mortgage or any part thereof; and that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable, as above expressed; or should any tax, assessment, water rent, municipal or governmental rate, charge or imposition which may or has become a lien upon the premises described in the said mortgage, and become due and payable; or should the obligor fail to keep the buildings, erected or to be erected, upon the lands described in the said mortgage insured against loss or damage by fire, in such companies and to such an amount, as from time to time may be required by THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, its successors or assigns, and fail to assign all such insurance policies and certificates to THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, its successors or assigns, as collateral security for the payment of the principal sum herein provided to be paid; and should the

Exhibit C. 16.

said interest or any part thereof, or any fire insurance premium, remain unpaid and in arrears for the space of thirty days; or should said tax, assessment, water rent, municipal or governmental rate, charge or imposition, or any of them or any part thereof remain unpaid and in arrears for the space of sixty days; then and from thenceforth, that is to say, after the lapse or expiration of any of the said periods, as the case may be, the above mentioned principal sum with all arrearages of interest thereon shall at the option of the said THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, its successors or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary notwithstanding; and the said THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, its successors or assigns, may at its option pay any such tax, assessment, water rent, fire insurance premium, municipal or governmental rate, charge or imposition in arrears, and the amount so paid shall be added to and become part of the principal sum secured hereby and by said mortgage, and shall be payable on demand with interest at the rate of six per cent. per annum.

AND IT IS HEREBY EXPRESSLY AGREED, That all the covenants and agreements made by the said obligor, in the said mortgage collateral hereto, are hereby made part of this bond, and are binding upon its successors and assigns.

IN WITNESS WHEREOF, and in pursuance of a resolution of the

passed on the

Exhibit C. 16.

day of One Thousand Nine Hundred the Common Seal of said corporation is hereto affixed, and these presents duly signed by JOHN L. HOLSTE, its President, and attested by HENRY E. HOLSTE, its Secretary, the day and year first above written.

J. L. H. COMPANY, INC.

By

President

Attest:

Secretary

BOND

from

J. L. H. COMPANY, INC.

to

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY

Condition, ...$50,000.00

Dated, April 1929

Exhibit C. 16.

THIS INDENTURE, made the
day of April, in the year of our Lord One Thousand Nine Hundred and Twenty-nine,
BETWEEN,
J. L. H. COMPANY, INC.
a corporation organized and existing under the laws of New Jersey, having its principal office located in the City of Jersey City, in the County of Hudson, and State of New Jersey, party of the First Part, and THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation organized and existing under the laws of New Jersey, having its principal office in the City of Newark, in the County of Essex and State of New Jersey, party of the Second Part:

WHEREAS, the said party of the first part is justly indebted to the party of the second part in the sum of

FIFTY THOUSAND DOLLARS

lawful money of the United States of America, to be paid on the first day of April, One Thousand Nine Hundred and Thirty-four, with interest on the said amount payable on the first day of October and April at the rate of five and one-half per cent. per annum, without any credit for taxes, secured to be paid by a certain Bond or obligation bearing even date with these presents, conditioned for the payment of the said sum to the said party of the second part, its successors or assigns, together with interest, taxes, assessments, fire insurance premiums, water rent, municipal or governmental rate, charge or imposition, and in the event of default of any such payments, providing for the prior payment of said principal, as in said Bond more fully appears:

Exhibit C. 16.

NOW, THIS INDENTURE WITNESSETH That the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said Bond or obligation with interest thereon according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to it in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part therewith fully satisfied, contented and paid, hath given, granted, bargained sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents doth give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part, and to its successors and assigns forever, ALL that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson, and State of New Jersey, which upon a certain map entitled "Map of property formerly the Tonnele Homestead, Hudson City, New Jersey, belonging to Robert C. Bacot, 1864," filed in the Office of the Clerk (now Register) of Hudson County, may 13, 1864, are known, laid down and designated as lots numbers one hundred and two and one hundred and three, fronting on the southerly side of Pavonia Avenue (formerly Prospect Avenue), each of said lots being twenty-five feet wide in front and rear and one hundred and twenty-five feet deep throughout.

TOGETHER with all and singular the tenements, hereditaments, and appurtenances, profits, privileges and advantages to the same belonging

Exhibit C. 16.

or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents and issues thereof; and ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof with the appurtenances. TO HAVE AND TO HOLD, all and singular, the above granted and described tract or lot of 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 party of the first part and its successors, warrants and will secure and forever defend the said land and premises unto the said party of the second part, its successors and assigns, forever, against the lawful claims and demands of all and every person or persons, clearly freed and discharged of, and from all manner of encumbrances whatsoever.

PROVIDED, ALWAYS, and it is agreed by and between the parties to these presents, that if the said party of the first part, or its successors, do and shall well and truly pay, or cause to be paid, without any credit, deduction or defalcation for taxes, assessments, water rent, municipal or governmental rate, charge or imposition whatsoever, to the said party of the second part, or to its certain attorney or attorneys, successors or assigns, the said sum of money mentioned in the condition of the aforesaid Bond or obligation and the interest thereon, at the times, and in the manner mentioned in said condition, according to the true intent and

Exhibit C. 16.

meaning thereof, that then these presents and the estate hereby granted, shall cease, determine and be void. AND the said party of the first part, its successors and assigns, does hereby covennant and agree to pay unto the said party of the second part, its successors or assigns, the said sum of money and interest as mentioned above and expressed in the condition of the said Bond. AND it is also agreed by and between the parties to these presents, that the said party of the first part shall and will keep the buildings, erected and to be erected upon the lands above conveyed, insured against loss or damage by fire, in such companies and to such an amount, as from time to time may be required by the said party of the second part, its successors or assigns, and shall and will assign all such insurance policies and certificates to the said party of the second part as collateral security for the payment of the principal and interest aforesaid.

AND the said party of the first part agrees that the said party of the second part, its successors and assigns, shall and may from time to time, and at all times after default shall be made in the performance of any condition or agreement contained in the Bond collateral hereto or contained herein, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy, all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said party of the first part, its successors or assigns, or of any other person or persons whatsoever.

AND the said party of the first part, its successors and assigns, does hereby covenant and agree to and with the said party of the second

Exhibit C. 16.

part, its successors and assigns, that the said party of the first part, its successors and assigns, will not claim or demand or be entitled to receive any credit or credits on the interest payable hereon or on the moneys to secure payment of which this mortgage is made for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof.

AND the said party of the first part, its successors and assigns, does hereby covenant and agree to and with the said party of the second part, its successors and assigns, that if any taxes, assessments, water rent, municipal or governmental rate, charge or imposition which may or has become a lien upon said premises, shall be in arrears or any fire insurance premiums remain unpaid, it shall be lawful for the said party of the second part, its successors or assigns, to pay such tax, assessment, water rent, municipal or governmental rate, charge or imposition, or such fire insurance premiums, with any expense attending the same, and the tax, assessment or other charge paid as aforesaid by said party of the second part, its successors or assigns, shall be a lien on said mortgaged premises, added to the amount of the said Bond or obligation, and secured by these presents, and payable on demand with legal interest. AND the said party of the first part, its successors and assigns, agrees that after the lapse of any of the periods set forth in the Bond collateral hereto, upon default of payment of interest, taxes, assessments, fire insurance premiums, water rent, municipal or governmental rate, charge or imposition, as the case may be, the principal sum of money mentioned in the condi-

Exhibit C. 16.

tion of the said Bond, at the option of the said THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, its successors or assigns, shall become and be due and payable immediately thereafter, although the said period may not then have expired, anything hereinbefore contained to the contrary notwithstanding.

IN WITNESS WHEREOF, and in pursuance of a resolution of the

passed on the day of One Thousand Nine Hundred and the common seal of said corporation is hereto affixed, and these presents duly signed by JOHN L. HOLSTE, its President, and attested by HENRY E. HOLSTE, its Secretary, the day and year first above written.

J. L. H. COMPANY, INC.

By

President

Attest:

Secretary

STATE OF NEW JERSEY }
COUNTY OF } *ss*

BE IT REMEMBERED, That on the day of April, in the year of our Lord One Thousand Nine Hundred and Twenty-nine, before me personally appeared Henry E. Holste, to me known, who, being by me duly sworn according to law, on his oath doth depose and say that he is the Secretary of J. L. H. COMPANY, INC., the mortgagor in the foregoing mortgage named;

Exhibit C. 16.

that the seal affixed to said mortgage is the Common Seal of said Corporation, and was so affixed by its order; that he saw John L. Holste, known to him to be the President of said Corporation, sign said mortgage, and heard him declare that he signed, sealed and delivered the same as the voluntary act and deed of said Corporation, by its order; and that this deponent signed his name thereto, at the same time as an attesting witness.

Subscribed and sworn before me at the day and year aforesaid.

MORTGAGE
from
J. L. H. COMPANY, INC.
to
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY

Condition, ...$50,000.00
Dated, April 1929

Received in the Office of the County of , New Jersey, on the day of A. D., 19 and Recorded in Book of Mortgages for said County, on pages

CLARENCE H. ALEXANDER
300 Broadway
Newark, N. J.

Exhibit C. 16.

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

JOHN L. HOLSTE, being duly sworn according to law says, that he is the President of the J. L. H. COMPANY, INC. the mortgagor to THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, of Newark, N. J., to secure a loan of $50,000.00 by the Bond and Mortgage dated the day of April, 1929

Deponent further says that the premises embraced in the said mortgage have been held by the said J. L. H. COMPANY, INC. and preceding owners from whom it derived title for the period of twenty years last past and upward, and that said possession has been peaceable and undisturbed and that the title has never been disputed or questioned to his knowledge or belief; nor does deponent know any facts by reason of which said possession or title might be disputed or questioned, or by reason of which any claim to any part of said property, or to an undivided interest therein adverse to said corporation might be set up or made; that the said mortgaged premises are free and clear from all incumbrances of every nature and sort whatever, recorded or unrecorded, except the mortgage above mentioned, and excepting also a mortgage given by Adele Holste and Henry Holste, her husband, to Frank Michle for $2,000, and assigned to Almira Heritage, which mortgage is to be paid off out of the proceeds of the mortgage first above mentioned.

Deponent further says that no alterations, repairs or improvements have been made to, nor have materials been furnished for, or labor performed in the erection, alteration, repair or im-

Exhibit C. 16.

provement of the building located upon the premises described in the mortgage first above mentioned within the past four months.

Deponent further says that there are no judgments against said corporation unpaid or unsatisfied of record docketed in the Office of the Clerk of the County of Hudson or in the Office of the Clerk of the Supreme Court of the State of New Jersey, or in the Office of the Clerk of the District Court of the United States for the District of New Jersey, and that no proceedings in bankruptcy have ever been instituted against it in any Court or before any officer of any State or of the United States.

Deponent further says, that all statements and representations in this affidavit contained are made in order to induce the making of the aforesaid loan.

Sworn this day of
, 19 , before me.

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

HENRY E. HOLSTE, being duly sworn according to law says, that he is the Secretary of the J. L. H. COMPANY, INC. and as such has custody of the records of said corporation.

Deponent further says that the Certificate of Incorporation of J. L. H. COMPANY, INC. was duly filed in the Office of the Clerk of the County of Hudson and that since the filing of said certificate, said corporation has not changed its name.

Deponent further says that a meeting of the Board of of said

Exhibit C. 16.

corporation was duly called and held at its regular place of meeting on the
and that a majority of the
of said corporation
were present, and constituted a legal quorum of said Board.

Deponent further says that at said meeting a resolution was unanimously and legally adopted authorizing the said corporation to execute and deliver under its corporate seal its bond to secure the sum of $50,000.00 payable in five years, with interest thereon at the rate of 5½ per cent. per annum, payable semi-anuually, to be secured by a mortgage covering premises owned by said corporation.

Sworn this day of
, 19 , before me.

TO:

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY

SIRS:

THIS IS TO AUTHORIZE, EMPOWER, and DIRECT you to pay to JACOB L. NEWMAN, attorney, the proceeds of the loan, amounting to Fifty Thousand Dollars ($50,000.00), for which we have this day executed a bond and mortgage bearing even date herewith, to secure said loan, to your company, which mortgage covers certain property designated as Lots Nos. 102 and 103, fronting on the southerly side of Pavonia Avenue (formerly Prospect Avenue), in the City of Jersey City, and we do hereby make, constitute and appoint JACOB L. NEWMAN, of the City

Exhibit C. 16.

of Newark, our sufficient and lawful attorney, for us, and in our name, to obtain the proceeds of said loan and to do and perform all necessary acts in the execution and prosecution in connection with the aforesaid business, as fully and amply as we might do if we were personally present acting therein.

IN WITNESS WHEREOF, we have caused these presents to be signed by our proper officers, and our seals affixed, the
day of April, 1929.

Signed, sealed, and delivered:
in the presence of:

J. L. H. COMPANY, INC.

By

.....

President.

ATTEST:

.....

Secretary.

Exhibit C. 17.

EXHIBIT C. 17.

Telephone Mulberry 3203

HENRY SCHLITTENHART
Attorney and Counsellor at Law
Grad Building
1023 Broad St., Newark, N. J.

April 9, 1929.

Jacob L. Newman, Esq.,
810 Broad St.,
Newark, N. J.

My dear Mr. Newman:—

In the matter of J. L. H. Co., Inc., I have received your letter of April 9th, together with enclosures. If you are insistent upon 48 hour's reply, it will be impossible for me to have definite word back to you by that time.

I have previously advised you and I also told your Mr. Zuker today at lunch that I am tied up in a Will contest and I am subject to call. If circumstances permit, I have tentative arrangements to go to Jersey City Thursday about the matter.

If you will bear with me, I assure you that definite reply will come back to you shortly. The matter now stands that it is up to me to meet with my clients.

Very sincerely,

H. SCHLITTENHART.

HS:B.
#119.

Exhibit C. 18.

EXHIBIT C. 18.

Telephone Mulberry 3203

HENRY SCHLITTENHART
Attorney and Counsellor at Law
Grad Building
1023 Broad St., Newark, N. J.

April 13, 1929.

Jacob L. Newman, Esq.,
810 Broad St.,
Newark, N. J.

My dear Mr. Newman:—

With regard to the J. L. H. Co., Inc.—Journal Plaza Holding Co. matter, confirming our telephone conversation, my clients are ready and willing to execute the $50,000. mortgage now in question, provided the terms and conditions are in accordance with the lease and the intent thereof. The consummation of the bond and mortgage placing the obligation on the J. L. H. Co. to assume the payment of the principal of this mortgage is not in accordance with their undertakings and intentions and which fact they claim can be verified by Mr. Weisenfeld and prior parties in interest.

I await your further advices or I am prepared at any time to meet with you and Mr. Weisenfeld and further discuss the matter if necessary.

Very truly yours,

H. SCHLITTENHART.

HS:B.
#119.

Exhibit D. 1.

EXHIBIT D. 1.

February 18, 1929.

Mutual Benefit Life Ins. Co.,
790 Broad Street,
Newark, N. J.

Att'n.: Mortgage
Loan Department.

Gentlemen:—

I represent the J. L. H. Company, Inc., owners of property at the South-east corner of Hudson Blvd. and Pavonia Ave., Jersey City, N. J., upon which property I understand you have agreed to loan the lessee thereof, Journal Plaza Holding Co., on bond and mortgage the sum of $50,000. to which mortgage my client is asked to join in under the terms of the lease.

Will you kindly advise me the general terms of the mortgage and any special conditions thereof? I ask this information in order that I may take up with my clients the necessary corporate action.

Very truly yours,

H SCHITTENHART

HS:B.
#119.

Exhibit D. 2.

EXHIBIT D. 2.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY
Newark, New Jersey

February 19, 1929

In re Application of J. L. H. Company Inc.
for Loan of $50,000, Hudson Boulevard &
Pavonia Ave., Jersey City, N. J.

Henry Schlittenhart, Esq.
1023 Broad Street
Newark, N. J.

Dear Sir:

We are in receipt of your letter of the 18th inst. seeking information in regard to the terms, etc. of the mortgage of $50,000 to be made on the property above mentioned.

In reply thereto we beg to say that a loan of $50,000 has been granted by this Company upon the above mentioned premises, which we are informed is a lot 125 by 50, for a term of five years at 5½ per cent.

We should have before the closing of the loan a copy of the resolution passed by the J. L. H. Company, Inc. authorizing the borrowing of the $50,000 upon the premises in question, and the execution of the bond and mortgage, and any other papers that might be necessary, by the proper officers of said corporation. The bond and mortgage, of course, will be drawn on the forms usually used by this Company in making loans.

Yours very truly,
JAY TEN EYCK
ASSOCIATE COUNSEL
By Clarence H. Alexander

CHA:SB

Exhibit D. 3.

EXHIBIT D. 3.

APPLICATION FOR LOAN
To
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY
Newark, New Jersey

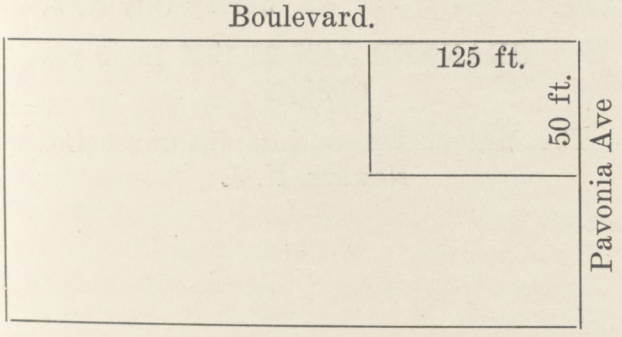
January 10, 1929

The undersigned desires to procure a loan of $50000 at 5½% interest, on the bond of J. L. H. Company Inc secured by a mortgage on the following property: City of Jersey City County of Hudson, State of New Jersey.

Located on the East side of Boulevard Street (No.....)
S. E. corner Pavonia Ave
Distant....feet North East South West from the corner of.....
(nearest cross street)
Size of plot 125 x 50 Size of main building 50 x 125 Stories 3 Room....Baths....
Building material Brick and Steel Purpose of use Stores & Offices.
(if dwelling, state how many families)
Age of building New There is no building now in course of construction, except No
There are no repairs in progress, or made within four months, except None
Is there a garage on premises? No
(if so, state size, material etc.)
When did you purchase this property?
What did you pay for it? $.....
Since purchase improvements to amount of $.... have been made, viz:
.....

Exhibit D. 3.

There is a mortgage now on the property for $.....held by.....
Assessed value $.....
Name of (wife or husband).....
Are premises rented? Yes.
Annual Rent? 42000
Term of lease? 5 years & $52000 for next five years.
Value of ground? $400000
Value of Buildings $200000
Total $
Buildings insured for $ 8 stores with tenants full occupied on first floor 1 tenant on second floor full occupied 1 tenant on third full occupied



Cubic feet contents 18000 feet

Signature J. L. H. Company, Inc.
Address by J. L. Newman
Atty

We have examined the property within described, and value it as follows:

Land at $30 S. F. per front foot	$187,500.
Buildings - - - - - - - - -	$150,000.
Total - - - - - - - - - -	$327,500

Exhibit D. 3.

and recommend a loan of $50000 with $50,000 fire insurance
Survey required? Yes

Robert C. Thomson

Dated Jan 15 1929.

APPLICATION FOR LOAN

$50,000

J. L. H. Company Inc.
S. E. cor. Pavonia ave
and Boulevard

Jersey City N. J.

GRANTED JAN 23 1929 for 5 yrs
@ 5½%

The Mutual Benefit Life Insurance Co.
Newark, N. J.

Exhibit D. 4.

EXHIBIT D. 4.

January 11, 1929.

Mr. Louis Holste,
Holste Platt Co.,
372 Mercer St.,
Jersey City, N. J.

Dear Louis:—

Mr. Jacob L. Newman, a local attorney, called me this morning and stated that Mr. Weisenfeld had been granted a loan of $50,000. by one of his clients and wanted to know why we objected to signing a mortgage of $100,000.

I told him that I had no real final decision in the matter, however, that my clients did not feel that they would care to sign a mortgage for any amount larger than what they were obligated in the lease. He said that he would call me up when the mortgage transaction was ready in order that I could arrange to have the mortgage signed.

I am writing this letter for your information as there is nothing which it is necessary for us to do at this time, except to wait until we have heard from them. If, however, they *realy* mean business and are going through with the mortgage at $50,000., we should prepare a resolution by the corporation authorizing the execution of the lease.

Very truly yours,

Henry Schlittenhart

HS:B.
#119.

Exhibit D. 5.

EXHIBIT D. 5.

Jacob L. Newman
Lionel P. Kristeller
Saul J. Zucker
Counsellors at Law
Telephone Market 5721

810 Broad Street
Newark, N. J.

January 18, 1929.

Mr. Henry Schlittenhart
1023 Broad St.
Newark, N. J.

My dear Mr. Schlittenhart:

I have procured a loan from the Mutual Benefit Life Insurance Co. of $50,000.00, covering the property on the Hudson Boulevard, opposite the Stanley Theatre, Jersey City, and I will arrange, as soon as the search is complete, and we are ready to close the matter, for your clients to execute the mortgage.

I am writing you pursuant to my telephone conversation with you a few days ago. With kind, personal regards, I am

Yours truly,

Jacob L. Newman.

N:G

Exhibit D. 6.

EXHIBIT D. 6.

February 18, 1929.

J. L. H. Company, Inc.,
c/o Louis Holste,
372 Mercer St.,
Jersey City, N. J.

Dear Louis:—

I have received from the office of Jacob L. Newman, a local attorney, a request for proper certified copy of Resolution from the J. L. H. Company authorizing the execution of a mortgage to the Mutual Benefit Life Insurance Co. of $50,000 covering your Jersey City property under lease to Journal Plaza Holding Co.

They also request that I take up with you and arrange to have receipted for cancellation the $2,000 mortgage held by Almira Heritage.

The new mortgage they state is to become due and payable within five years. They also require a statement of corporate standing, signed by the Secretary, a copy of which they sent. I have written to the Mutual Benefit Life Insurance Co. asking them to give me the full terms and conditions of their mortgage and as soon as I receive the answer from them, I will get in further touch with you.

Very truly yours,

HS:B.
#119.

EXHIBIT D. 7.

February 28th, 1929.

Samuel B. Weisenfeld, Esq.,
75 Montgomery Street,
Jersey City, N. J.

Dear Mr. Weisenfeld:—

In the Holste matter could you arrange to come over and see me as there is a situation which I would like to talk to you about. I will be glad to arrange an appointment satisfactory to you.

Very sincerely yours,

HS:SS
#119

EXHIBIT D. 8.

Law Offices
SAMUEL B. WEISENFELD
Union Trust Co. Bldg.
75 Montgomery Street
Jersey City, N. J.
Telephone 625-6 Montgomery

January 9th, 1928.

J. L. H. Co., Inc.,
372 Mercer Street,
Jersey City, N. J.

Attention: *Mr. Louis Holstein, Treasurer.*

Dear Mr. Holstein:—

Confirming my conversation had with you in which I stated that I have forwarded you the

Exhibit D. 9.

rent due January 1st covering property 649-651 Pavonia Avenue, Jersey City, please be advised that the Journal Plaza Holding Co. is now the owner of said Leasehold, having purchased said Lease from Andrew J. M. Reich. In the future, you can expect payments of rent from me as Secretary.

Very truly yours,

Samuel B. Weisenfeld.

SBW/R

EXHIBIT D. 9.

#119

Law Offices
SAMUEL B. WEISENFELD
Union Trust Co. Bldg.
75 Montgomery Street
Jersey City, N. J.
Telephone 626 Montgomery

December 26, 1928.

Henry Schlittenhart, Esq.,
1023 Broad Street,
Newark, N. J.

Dear Mr. Schlittenhart:—

Kindly advise me at once just what the J. L. H. Co., proposes doing with respect to the proposition submitted to you at our last conference.

If it is their intention to accept our proposition for an additional rental of $1000. annually in consideration of which they will permit us to

Exhibit D. 11.

raise a mortgage of $100,000. Please let me know accordingly.

If on the other hand they desire to sell the property, perhaps, if the price is satisfactory, I can arrange for a consideration of this matter.

Kindly let me know what their price is. In any event communicate with me at your earliest convenience.

Very truly yours,

Samuel B. Weisenfeld.

SBW/R

EXHIBIT D. 11.

Law Offices
SAMUEL B. WEISENFELD
Union Trust Co. Bldg.
75 Montgomery Street
Jersey City, N. J.

Telephone 626 Montgomery

November 20, 1928.

Henry Schlittenhart, Esq.,
1023 Broad Street,
Newark, New Jersey.

Dear Sir:—

I am very much disturbed over your letter of November 19th.

I have felt throughout that my relations with the Holstes have been made clear to them, as I have always advised them of my intentions and thoughts with respect to the leasehold that we hold. I always endeavored to make my plans

Exhibit D. 11.

clear to them and am not at all concerned with outside sources may say in order to disturb our relationship.

It was only last week that I again saw Mr. Holste and suggested to him that I had been authorized by Mr. Stein to make a proposition to him, the *jist* of which was, that if the Holstes would permit us to raise a mortgage of $100,000 that we, in turn, would pay $1,000 per year additional rent on the lease that we now hold. I have always felt that any suggestion that I made to them would in turn be made to you and have always so advised them. The fact that I go to them direct is that it is more convenient for me as they reside in Jersey City.

I believe that the above proposition is a worthy one for them to consider as it certainly will not jeopardize their interest in their property and if anything, gives them additional revenue. I would like very much for you to inspect the property and I you would be greatly surprised of the type of building that is constructed upon the Holste property.

I would like you to have your clients advise me shortly as to whether they intend accepting this new proposition.

Just as soon as the standard rate has been accepted permanently under the Fire Insurance Underwriters, I will forward you a policy complete. At the present time, all we have is construction insurance, which I have already forwarded to you. I will only be too happy to send you any other policies as soon as we take official possession.

With kindest regards, I am
Very truly yours,
SAM'L B. WEISENFELD.

SBW/R

Exhibit D. 12.

EXHIBIT D. 12.

November 19, 1928.

Samuel B. Weisenfeld, Esq.,
Attorney-at-Law,
75 Montgomery St.,
Jersey City, N. J.

Dear Mr. Weisenfeld:—

Louis Holste has conferred with me regarding your letter to him of November 9th.

I advised you recently that after a consultation with the Holstes, it was decided that their interests would be best conserved by leaving the situation as it is. I have told them that there is no legal obligation on their part to cancel the small mortgage with which you undoubtedly agree.

I don't mean to criticise, but it appears to me that the general situation would be easier if your plans were made known to them with respect to any matters affecting their reversionary interest. From things which have been told to me and also which have come to them from different sources, I don't believe that they have been fully informed in a measure to act fairly as to their own interests.

As to any changes whatsoever in the lease itself, I have cautioned them not to do so until we have been fully informed and I have so advised them. This action I consider necessary in the interests of my clients.

Have you as yet arranged for the additional insurance features required under the lease. You have not answered my previous letter in that respect.

Exhibit D. 13.

With kindest personal regards, I am
Very truly yours,

HS:B.
No. 119.

10

EXHIBIT D. 13.

Copy to Mr. Louis Holste,
372 Mercer St.,
Jersey City, N. J.

November 1, 1928.

Samuel B. Weisenfeld, Esq.,
Union Trust Co. Bldg.,
75 Montgomery St.,
Jersey City, N. J.

20

Dear Mr. Weisenfeld:—

From what I learned last evening, an apology is in order from me for not having answered your previous letter.

I met Mr. Louis Holste and he told me that you felt hurt at my not having answered your letter. I had assumed that they had advised you the result of a short conference which I had with them recently. In the pressure of business which I have in hand, the matter passed from my mind altogether. At the conference the whole situation was gone over in a general way and the Holste boys decided that they would leave the whole matter as it stands. As I view the matter, there are no questions of law involved and, of course, under the circumstances, it is entirely a matter for their decision.

30

40

Exhibit D. 13.

Have you negotiated further insurance to which they are entitled under the Lease and of which we have had previous correspondence?

With kindest personal regards, I am

Very truly yours,

HS:B.
#119.

Dear Louis:—

The above is a copy of a letter which I have just sent to Weisenfeld and which I send to you in order that you may be acquainted with it. Govern yourself accordingly.

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

New Jersey Court of Errors and Appeals

Journal Plaza Holding Co., a corporation, *Complainant-Appellant,* *vs.* J. L. H. Company, Incorporated, a corporation, *Defendant-Respondent.*	*On Appeal.*

BRIEF ON BEHALF OF APPELLANT.

(Italics ours except as otherwise noted.)

Statement.

This is an appeal by the complainant below from a final decree entered in the Court of Chancery November 6, 1929, advised by Hon. John H. Backes, Vice-Chancellor, dismissing the Bill of Complaint.

Facts.

The bill of complaint in this cause was filed to compel the specific performance of an agreement on the part of the respondent to execute a bond and mortgage in the sum of $50,000.00 on premises at the southeast corner of Hudson Boulevard and Pavonia avenue, Jersey City, New Jersey, which the respondent leased to one Matthew J. Makaus for a period of approximately twenty-five years, with an option for an additional twenty-five years, and which lease the appellant acquired by mesne assignments. The original lease was executed in September, 1925, and the appellant acquired the tenant's interest in the

leasehold in July, 1928, almost three years thereafter. Upon acquiring the leasehold, the appellant, relying on the terms of the lease as to the financing of a building, erected a magnificent three-story, steel and stone building, containing eight stores on the ground floor, a restaurant on the second floor and a billiard academy on the third floor (S. C., p. 101). The appellant's investment in the leasehold is $175,000.00 of which $25,000.00 was paid for the assignment of the lease and $150,000.00 expended in erecting the building.

The building was erected by the appellant, relying upon the following clause in the lease (S. C., p. 87, l. 31—p. 88, l. 4).

> "That the said lessor shall permit the said lessee, his successors or assigns to raise cash to an extent not to exceed 2/3 of the value of the cost of said improvements, *which money is to be secured by a bond and mortgage, to be executed by the lessor,* its successors or assigns, and to be a lien upon the said demised premises, and the buildings and improvement thereon. That said two-thirds of the cost of the said improvements is not to exceed the sum of $50,000.00; *that the bond and mortgage shall remain a lien upon the said demised premises, and the improvements erected thereon.*"
>
> "It is further agreed that the lessee shall pay all *interest* on the said mortgage so raised during the term of this lease or the term of the said bond and mortgage, said interest to be paid within thirty days from the due date. It is further agreed that *the improvements so made on the said premises shall be the property of the lessor,* subject to this lease."

Upon the completion of the building, the appellant applied for, and procured from the Mutual Benefit Life Insurance Company of

Newark, New Jersey, the grant of a mortgage loan of $50,000.00. In due course appellant presented to respondent (landlord) for execution the requisite papers in the usual and customary form, in order to procure for itself the proceeds of the mortgage loan of $50,000.00, and reduce its investment in said property from $175,000.00 to $125,000.00 (S. C., p. 29, l. 34).

The respondent refused to execute the bond and mortgage, contending that because the lease did not contain the terms of the mortgage as to amount of interest, duration, and default, it was too indefinite to be specifically enforced. The learned Vice-Chancellor below, terming this conduct on the part of the respondent as the advancement of a technical defense, refused to apply the doctrine sought, and on the contrary held that a party to a contract, who on his part reaps the advantages of the other party's performance (as did the respondent in the instant case by accepting appellant's rent and having upon its land a structure erected at a cost of $150,000), can not refuse to perform his end of the bargain on the ground that his corresponding obligation is not sufficiently specified. "In such circumstances when a contract has been partly executed and there is no adequate remedy at law equity will strain its power to enforce complete performance" (Opinion of Vice-Chancellor S. C., p. 14, l. 38).

Defeated in its effort to thwart the appellant from reaping the benefits of its contract, upon a technicality of this character, the respondent then relied upon its interpretation of the lease * * * that the ultimate liability to discharge the mortgage debt was the appellant's and not the respondent's * * * and near the conclusion of the hearing went so far as to move for a ref-

ormation of the original lease—executed almost three years before appellant acquired it by assignment—so that it would contain a clause embodying respondent's contention (S. C., pp. 73-75). At that time the learned Vice-Chancellor reserved decision, stating among other things, that if he found the liability was ultimately the tenants, he would direct the respondent to execute the bond and mortgage and the appellant to give security that the mortgage would be paid by it. The appellant signified its consent that this disposition be made if the Court upheld respondent's interpretation of the lease (S. C., p. 75, l. 24). At the conclusion of the case, however, the Court, although it construed the lease adversely to appellant's contention, did not permit appellant to give security and obtain the present benefits of the execution of a bond and mortgage by the respondent, but dismissed the bill of complaint.

The decision of the Court below leaves the appellant in a most embarrassing situation. Appellant expended a large sum of money to purchase the lease relying upon the terms of that instrument which could have but one meaning as to the liability to discharge the mortgage debt * * * viz., that the obligation was to be discharged by the respondent landlord * * *. Appellant then spent many times the purchase price of the lease in erecting a substantial building upon respondent's land. It was then met with the refusal of the respondent to execute the bond and mortgage unless security was provided that appellant would discharge the debt. It then came into a court of equity seeking relief and, without concealment of any kind, set forth the construction

of the lease as both appellant and respondent viewed it (S. C., p. 4, ll. 16-40):

> "8. That the defendant, scheming, contriving and designing to cheat and defraud the complainant out of the benefits of its lease and with the avowed purpose and intent of compelling the complainant to abandon said premises and its valuable leasehold, and endeavoring to repossess itself of the premises, the value of which has greatly been enhanced by the complainant's erection of said building, has refused and still refuses to execute the Bond and Mortgage so presented and tendered to it by the complainant as herein above set forth, *stating as its only reason for such refusal, that it, the defendant, is not bound to assume the payment of the principal of said Mortgage and that although the said Bond and Mortgage are in respect to amount, time and in all other respects, satisfactory to the said defendant, yet the defendant maintains that it is entitled to a collateral agreement by the complainant that the complainant will pay and discharge the principal of said mortgage obligation all of which the complainant maintains is contrary to the written lease existing between the parties.*"

The appellant is now confronted with the decision of the Court below denying it any relief at all. The respondent was not even directed to execute the bond and mortgage upon being secured that appellant would ultimately discharge it (if such construction is deemed correct). As a result of this decision the appellant is placed in a most distressing and inequitable position, both financially and in so far as concerns the preservation of its rights under the terms of the lease.

The Vice-Chancellor based this drastic feature of his opinion upon the theory that appellant's application for equitable relief constituted duplicity toward the Court and an attempt to

overreach the respondent. And this, in the face of appellant's complete frankness and candor both in its bill of complaint and its testimony!

One of the principal questions in the case and one which will be discussed at length in this brief was the propriety of the Court below in considering evidence of conversations between parties to the *original* lease prior to its execution and nearly three years before the assignment to appellant. It seems highly inequitable and unjust to charge the appellant, a bona fide purchaser for value, with notice of conversations which took place prior to the execution of the lease. As far as the appellant is concerned, standing in an equitable position as a bona fide purchaser for value, all negotiations leading up to the execution of the lease should be considered as merged in the written document, culminating the negotiations, *Long* v. *Hartwell*, 34 N. J. L. 116. It was on the strength of the written lease which had been recorded, that the appellant invested a sum of $175,000.00, and it relied expressly upon the provisions of the lease that its investment would be reduced $50,000.00 by obtaining the proceeds of the mortgage to be executed by the landlord, and that the obligation would be ultimately discharged, not by the tenant, but by the landlord who in return would then be the owner of an edifice erected upon its land.

As the appellant perceives the case there are four questions of law involved, each sharp and distinct, and all of which should be decided in appellant's favor. Enumerated below, they will be discussed in the following order:

1. IN VIEW OF THE PROVISIONS OF THE LEASE, WAS IT PROPER FOR THE COURT TO DECIDE WHO ULTIMATELY SHOULD BE LIABLE FOR THE BOND AND MORTGAGE, OR SHOULD THE COURT HAVE DETER-

MINED SOLELY WHETHER APPELLANT WAS ENTITLED TO HAVE RESPONDENT EXECUTE THE BOND AND MORTGAGE, LEAVING THE QUESTION AS TO ULTIMATE LIABILITY UNTIL SUCH TIME AS IT SHOULD PROPERLY ARISE?

2. IF IT WAS PROPER FOR THE COURT TO DETERMINE AT THIS TIME WHO WAS ULTIMATELY RESPONSIBLE FOR PAYMENT OF THE MORTGAGE, WHICH PARTY, UNDER A CORRECT CONSTRUCTION OF THE LEASE, WAS TO DISCHARGE THE MORTGAGE DEBT?

3. WAS THE ADMISSION OF CONVERSATIONS, TAKING PLACE AT OR BEFORE THE LEASE WAS EXECUTED, ATTEMPTING TO VARY THE TERMS THEREOF, PROPER; AND COULD SUCH CONVERSATIONS BE BINDING UPON AN INNOCENT PURCHASER FOR VALUE WITHOUT NOTICE, WHOSE RIGHTS THEREUNDER WERE ACQUIRED THREE YEARS AFTER THE MAKING AND EXECUTION OF THE LEASE?

4. WAS THE APPELLANT GUILTY OF SUCH CONDUCT AS WOULD DISENTITLE IT TO EQUITABLE RELIEF?

POINT I.

Appellant is entitled to have respondent execute the bond and mortgage, and a decision upon the question of ultimate liability postponed until it should properly arise.

The right to specific performance of an agreement to mortgage is clear. *Dean* v. *Anderson,* 34 N. J. E. 496; *Clark* v. *Van Cleef,* 75 N. J. E. 152.

The appellant maintains, *in limine,* that it is entitled to a strict performance of the terms of the lease—that the respondent execute the bond and mortgage—without more; and the question as to which party must ultimately discharge the mortgage debt should not be determined at this time. If this was such an important considera-

tion and of such apparent importance to the respondent, it could, with the stroke of a pen, have been inserted in the original lease by the respondent who prepared it (S. C., p. 78, l. 30), and against whom all ambiguities, if any, must now be resolved. The comparatively recent case of *Fletcher* v. *Interstate Chemical Company,* 94 N. J. L. 332, affirmed 95 N. J. L. 543, is declarative of this principle:

> "And this view is strengthened by the fact that the ambiguous words in question were the words of the defendant, and the rule is that where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises; the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the court will adopt a construction by which they would mean another thing more to his advantage."

This quotation is pertinent to the instant question as the respondent prepared the lease and was present at its execution while the appellant was not.

The appellant maintains, therefore, that an interpretation of the lease does not involve at this time a decision as to which party must ultimately discharge the mortgage, but that on the contrary the sole question to be determined is, whether the appellant is entitled to have the respondent execute a bond and mortgage for $50,000.00. A determination of this latter issue alone is legally proper under the circumstances, and if the respondent finds itself embarrassed in the absence of a decision at this time as to ultimate responsibility, the situation is one of its own creation. The respondent prepared the lease and was pres-

ent at its execution, and should alone be responsible for its own carelessness and negligence.

POINT II.

A fair construction of the lease leads to the irresistible conclusion that the mortgage debt was to be discharged by the respondent, and was not the appellant's obligation.

The pertinent features of the lease relating to responsibility for the mortgage debt are contained in the clauses set forth in the opening portion of this brief. The appellant insists that the import of the language used, the ordinary interpretation of the words inserted, and the legal conclusions to be drawn from their use, present five clear and convincing reasons that the discharge of the mortgage debt was to be assumed and paid by the respondent, and was not an obligation of the appellant.

1. Referring to the mortgage, the lease provides: " * * * *which money is to be secured by a bond and mortgage to be executed by the lessor* * * *"

The stipulated execution of the *bond* by the landlord, states in unmistakable terms whose obligation it is. The bond is the primary obligation and the mortgage only the security, and the responsibility for the primary obligation is sufficient to determine the question of ultimate liability. If it were intended that the landlord was not to be primarily and ultimately liable, the lease in simple language could have easily provided that the landlord was to execute the *mortgage only,* and thus simply convey its interest in the fee as security to permit the tenant to raise the $50,000.00. But the respondent who prepared the lease didn't do that; intending at

the time of the execution of the lease that it was to be liable for the debt, it properly provided that, as landlord and owner of the premises it would execute the bond accompanying the mortgage, and thereby acknowledge its indebtedness to the mortgagee. Could a clearer or more definite means have been taken to stipulate and fix the responsibility for the debt?

2. The lease further provides: "* * * *that the bond and mortgage shall remain a lien upon the demised premises and the improvements erected thereon* * * *"

This clause most emphatically contradicts the respondent's notion that the mortgage is to be discharged by the tenant (appellant). What other construction is possible in view of the words "remain a lien" than, that after the termination of the lease, the bond and mortgage should remain a lien against the premises, and naturally to be discharged by the person who at that time was the owner of the premises and improvements—viz.: the landlord. Any other construction would have demanded the insertion of words, not that the mortgage remain a lien, but that the mortgage be discharged by the tenant at or prior to the termination of the lease.

3. The lease further provides: "* * * *the improvements so made on the premises shall be the property of the lessor* * * *"

A reasonable, equitable and fair interpretation of this clause is that as the building erected by the tenant at its own cost passes to the landlord, it carries its corresponding burden of the mortgage debt. This should be so, because the landlord controlled the maximum amount for which he would be responsible—2/3 of the value of the building but in no event more than $50,-

000.00. It would require a stretch of the imagination to assume that a gift of the building of the proportions involved here (S. C., p. 101) were intended, unless the lease expressly provided that the building was to pass to the landlord free of all encumbrances, which it did not.

4. The lease further provides: "* * * *the lessee shall pay all interest on the said mortgage so raised* DURING THE TERM OF THE LEASE * * *"

It is important to note that only the interest is specifically mentioned to be paid by the tenant. If, as respondent maintains, the entire mortgage debt, principal and interest, was the tenant's, why mention restrictively in so many words that *interest* was to be paid by the tenant? The reason is simple; because in view of the execution of the *bond* by the landlord, the entire mortgage debt, *principal and interest,* would have been the landlord's, *but as the lease was intended to be a "net lease," it was specifically covenanted that the tenant was to pay the interest,* and the lease being silent as to the payment of the principal, it must be construed that the obligor of the bond must satisfy that obligation.

5. The fact that no method is provided in the lease securing to the landlord an assurance that the tenant would discharge the obligation of the mortgage, clearly indicates that it was never intended that the tenant pay it. The present argument of the respondent attempting to justify its refusal to execute the bond and mortgage unless security was provided by the tenant that it would ultimately pay the obligation, acts like a boomerang, and proves that the respondent as an afterthought jumped at this straw, to defeat the appellant, a bona fide purchaser for value, of reaping the advantages of its contract. What would

have been more reasonable than that at the time of the execution of the lease, drafted by attorneys of the respondents, provision for security be inserted if it had actually been intended that the obligation was ultimately to fall upon the tenant.

For these five reasons the appellant submits that the lease itself requires the respondent landlord to pay the mortgage debt and not the appellant tenant.

POINT III.

Parol evidence of the conversations taking place at or before the lease was executed and at a period nearly three years prior to the assignment of the lease to appellant, attempting to vary the terms thereof by providing for a mortgage to be paid and discharged by the tenant, was inadmissible.

The appellant maintains that the lease on its face is clear and specific as to whose obligation the bond and mortgage referred to was. The fact that the bond was to be executed by the landlord, the fact that the mortgage was to remain a lien on the premises, and the fact that it was expressly mentioned that the tenant should pay the interest in order to preserve a net rental for the landlord all lead to the irresistible conclusion that the obligation was the landlord's.

In *Castlebaum* v. *Wolfson*, 92 N. J. L. 165, the defendant purchaser of a saloon was sued upon an agreement to assume the payment of a mortgage existing on the saloon. The defendant endeavored to prove by conversations had at the time of the execution of the agreement that he was not to pay all of the interest due under the mortgage, and the Court, in stating that payment

of the mortgage included the principal of mortgage and interest, further held:

> *"It is further contended that the court erred in excluding a conversation between the parties, had at the time of the execution of the agreement, as to what part of the interest, if any, should be assumed and paid by the defendant. We think this testimony was properly excluded. The written contract is plain, and was an agreement on the part of the defendant to pay both the principal and the interest of the mortgage. Testimony offered for the purpose of proving a conversation had at the time of the execution and delivery of the agreement, which controverted the writing itself, is not admissible in the absence of fraud. No principle is more firmly imbedded in our law than that which declares that in the absence of fraud or illegality, where a written agreement is complete on its face, oral testimony will not be permitted either to contradict it or to supply terms with respect to which the writing is silent. In such a case the writing must be accepted as a full expression of the agreement of the parties."*

In the case at bar, the lease was clear on its face, and inasmuch as the respondent does not rely on any fraud, parol evidence should not have been permitted to controvert the terms of the written lease.

An opinion of like import written by Gummere, *C. J.*, who also wrote the opinion in the Castlebaum case, (*supra*), is *Childs* v. *South Jersey Amusement Co.*, 95 N. J. Eq. 207. The defendant in a suit to foreclose a mortgage sought to interpose the defense that it was orally agreed at the time of the execution of the mortgage, that payment would not be due for two years, although the due date in the mortgage was one year. The Court, in referring to an earlier case of *Park* v. *Jameson*, 32 N. J. Eq. 222, where a similar de-

fense was attempted to be interposed, excluded the testimony, and repeated what Vice-Chancellor Van Fleet, in dealing with this defense, said:

> "'The question, it will be perceived, is, whether this contemporaneous parol agreement can be given effect, * * * so as to **alter or vary the terms** of the mortgage. The law upon this subject is elementary. It is part of the alphabet of the law of evidence that, when the parties to a contract have deliberately put their engagements into writing, in such terms as to import a legal obligation, without any uncertainty as to the object or extent of their engagements, it is conclusively **presumed that every part of their contract** was reduced to writing; *and all oral evidence therefore of what was said previously or at the time the writing was executed, must be excluded, on the ground that the parties have made the writing the only evidence of what they agreed to,* AND WHATEVER IS NOT FOUND THERE MUST BE UNDERSTOOD TO HAVE BEEN WAIVED AND ABANDONED.'

And Gummere, *C. J.*, continued:

> "And Justice Depue in Naumberg *v.* Young, 44 N. J. L. 331, 339, 43 Am. Rep. 380, 386, uses the following language:
>
> > 'The only safe criterion of the completeness of a written contract as a full expression of the terms of the parties' agreement, is the contract itself. When parties have deliberately put their mutual engagements into writing in such language as imports a legal obligation, * * * all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before * * * or at the time of the completion of the contract, will be rejected. * * * *If the written contracts purport to contain the whole agreement, and it is not apparent from the writing itself that something is left out to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admisssible.'*

"And this rule was reiterated by this court in the case of Van Horn *v.* Van Horn, 49 N. J. Eq. 327, 23 Atl. 1079, the rule being there stated as follows:

'In the absence of ambiguity in a written agreement which is complete, oral evidence cannot be introduced to explain or vary it. If, through mistake, an agreement in writing does not express the contract which the parties intended to make, the remedy is in equity to reform it, but until it is so reformed it is unassailable by parol testimony.' "

A very recent case on the same point is *Cohen et al.* v. *Cohn*, 6 A. R. 270, 140 Atl. 319, which involved the specific performance of an agreement to convey real estate. The Court of Chancery admitted parol evidence of conversations to the effect that the deed was not to be delivered if the grantor became reconciled to his children, in which event five hundred dollars was to be paid as liquidated damages. The Court of Errors and Appeals speaking through Justice Trenchard held that this was not a case where parol evidence was admissible to show the non-existence of an apparently existing contract, but the evidence was introduced to vary and to declare null and void a previously existing contract. The lower court was reversed and referring to *Naumberg* v. *Young, supra*, the Court said:

"The effect of these decisions is to hold that parol evidence is not admissible which, conceding the existence and delivery of the written contract, and that it was at one time effective, seeks to nullify, modify or change the obligation itself, by showing that it is to cease to be effective or is to have an effect different from that stated therein, upon certain future contingencies or conditions, for such evidence varies or contradicts the terms of the writing."

From all of these cases it seems absolutely clear that the testimony offered by the respondent that, at the time the lease was executed the mortgage was to be considered an obligation that the tenant would have to pay and discharge, should not have been admitted and should have been wholly disregarded.

POINT IV.

The appellant's conduct throughout its negotiations with the respondent and the resulting litigation has always been open, fair, honest and equitable, and the appellant has not been guilty of any impropriety of conduct, disentitling it to relief in a court of equity.

It is important at this point to note that after the Vice-Chancellor had determined all the equities arising out of the execution of the written document, in favor of the appellant, even to the extent of intimating at the hearing that the execution of the bond and mortgage would be ordered upon the applicant's giving security for its payment, he refused appellant equitable relief on the very attenuated theory and on the narrow issue that the appellant was guilty of impropriety of conduct. The impropriety of conduct suggested by the Vice-Chancellor, as we view it, was the application to a court of conscience for a judicial construction of a lease, which the appellant and the respondent interpreted differently. The construction of the lease must be determined as of the time of its execution, and anything that the parties might have done subsequently could not in anywise affect the meaning of the lease itself.

The question then resolves itself to a single inquiry: Did the appellant do anything which

should move the court of equity to decline to give it equitable relief? A The court below held that the appellant's application for a construction of the lease while objecting to the introduction of conversations had at its execution was an attempt to over-reach the respondent and constituted duplicity toward the court. This, in spite of the fact that the lease is not in the least ambiguous, and in the face of all the reported cases from *Naumberg* v. *Young, supra,* to the very recent case of *Cohen* v. *Cohen, supra.*

In support of its view the court refers to five cases, which the appellant will analyze briefly, to show that the cases present no obstacle to the relief prayed for, and are not, in our opinion, applicable to the situation at bar.

In *King* v. *Morford,* 1 N. J. Eq. 274, the defendant contracted to sell some property to the complainant upon terms. The deposit was paid by the complainant and after evincing by his conduct an intention to abandon his contract, *he, several years later, tendered the purchase price and demanded a deed.* Upon the defendant's refusal to deliver, he filed a bill for specific performance. There was evidence that the complainant in the interim had openly stated that he did not want the property and would just as soon see another person acquire it. The Court in denying the complainant relief because of his gross negligence and abandonment of his contract, and his attitude which was in effect to say that the contract was at an end and in no wise binding, said at page 281:

> "Whether or not a contract shall be ordered to be specifically performed by this court, is always a matter resting in sound discretion. * * * If the claim for a deed is not just and reasonable; if a party has been grossly negligent of his rights, or has

> abandoned his contract, equity will not afford him extraordinary relief. The strict rule is this, that the party who comes into equity for a specific performance, must come with perfect propriety of conduct, otherwise he will be left to his remedy at law."

Miller v. *Chetwood,* 2 N. J. Eq. 199, was a suit for specific performance of a contract of sale of real estate by the seller against the buyer. The testimony disclosed that when the agreement was made, the seller had orally represented the property to be of more acreage than he actually owned and could convey, and although it did not appear that the misrepresentation was intentional, the Court denied the seller relief because of the misrepresentation, deeming it *inequitable to enforce the contract upon the evidence adduced in this case.*

Clickner v. *Clickner,* 95 N. J. E. 479, involved a suit for annulment of a marriage by the husband on the ground that *his wife concealed the fact that she was pregnant by another man.* The testimony revealed that the husband had knowledge of her relations with another man prior to their marriage, and the Court regarded the husband's application for equitable interposition as an imposition upon the Court and refused him any relief at all.

In *Newark Cleaning and Dye Works, Inc.* v. *Gross,* 6 Ad. Rep. 598, 140 Atl. 684, the defendant had sold out his business of cleaning and dyeing garments to the complainant and covenanted not to re-engage in that business. A bill of complaint was filed to enforce this covenant, and the defendant counterclaimed, asking for a reformation of the covenant so that he would be permitted to dye rugs and carpets, as distinguished from garments. The testimony showed that while

the defendant had not directly violated his covenant, he had fulfilled his boast that he would harm the complainant by reengaging in business indirectly, and for this reason the Court held that his conduct was so inequitable that no relief of reformation would be granted to him.

In *Pfender* v. *Pfender,* 7 Ad. Rep. 142, 144 Atl. 333, there was an application to set aside a *decree nisi.* The husband had secured a decree of divorce from his wife on the ground of extreme cruelty, which consisted, among other things, of an accusation of his infidelity with another woman. The Court had been led to believe that the relations between the husband and the other woman were at an end when exactly the contrary was the fact. Proof that these relations were still maintained moved the Court to vacate the *decree nisi,* on the theory that the husband's conduct during the litigation, and especially in court, must be above reproach.

The appellant maintains that not one of these five cases present circumstances analogous to the case at bar. There was no abandonment of the appellant's contractual rights; the appellant has not been grossly negligent in the assertion of its rights, as in the King case (*supra*); nor has the appellant been guilty of any misrepresentation as in the Miller case (*supra*); nor has the appellant concealed his knowledge of any facts such as the chastity of the defendant, as in the Clickner case (*supra*); nor has the appellant been guilty of indirectly breaching its agreement as in the Newark Cleaning and Dye Works, Inc., case (*supra*); nor has the appellant been guilty of representations analogous to those concerning meretricious relations as in the Pfender case (*supra*).

The appellant has not been guilty of misrepresentations to the respondent or the Court, but on the contrary, it has been entirely bona fide, open and honest throughout; so much so, that at the inception of this litigation and in its bill of complaint, it set forth the position taken by the respondent as well as its own view of the ultimate liability as to who was to pay the mortgage debt. Can it then be said that the appellant's application for equitable relief has not been based upon honest dealing and open and fair conduct to the Court?

It is important in the consideration of this case to bear in mind a salient feature, namely, that the appellant acquired this leasehold three years after the original lease was executed and delivered. The respondent's testimony, admitted over objection, was to the effect that when the original lease was executed, it was understood that the tenant of the property was to discharge the mortgage debt by amortization. This feature must have been most important to all parties concerned in the making of the lease. It was not mentioned nor even intimated in any of the terms of the lease. The testimony upon cross examination of Julius L. Reich and William E. Sewell, both solicitors of this court, the scriveners of the lease and assignment to appellant, was to the effect that nothing relative to amortization of the mortgage was sufficiently agreed upon to be inserted in the lease at the time of its execution:

> "Q If there was to be any amortization, didn't you think that was an essential part to be put into the lease? A That was not known at the time. We didn't know what process was going to be employed at the time that the lease was drawn. The amortization proposition was discussed subsequent to the drawing of this lease" (S. C., p. 47, l. 36),

and that the matter was not deemed of sufficient importance nor were the terms sufficiently certain to be inserted in the assignment:

> "Q You didn't think it essential to put in anything about this so-called amortization, did you? A No, I did not. I thought the matter was understood. I didn't pay too much attention to that. Mr. Weisenfeld was a member of the bar and nothing was said to me about it" (S. C., p. 53, l. 27).

The testimony of all the respondent's witnesses was to the effect that at the time the lease was executed, it was not definitely decided how amortization, if any, was to be made and therefore nothing was inserted in the lease regarding this feature. On the contrary, the appellant's witness, Weisenfeld testified that at the time the sale of the leasehold was submitted to him by Sewell and Reich (which was three years after the execution and delivery of the lease), they represented that whatever investment appellant would make in erecting a building, provided it was $75,000.00 or more, could be immediately reduced by $50,000 from the proceeds of the mortgage to be executed by the owner. Weisenfeld was asked whether anything relative to amortization was discussed at the time the assignment was made, and he frankly admitted that amortization relative to the proposed investment was very thoroughly discussed, but never amortization of the mortgage. Amortization of the appellant's net investment in the proposition was discussed in order that appellant would know exactly how much of its investment would have to be written off each year. Appellant frankly stated that it had figured its investment to be $125,000.00 made up as follows: $25,000.00 for the purchase of the leasehold and $100,000.00 for the erection of the building.

After obtaining the proceeds of the $50,000.00 mortgage the appellant's net investment would be $75,000.00, which, over a period of fifty years could be amortized on its books at the rate of $1,500.00 a year (S. C., p. 81, l. 13; p. 82, l. 12). The building, in fact, cost $150,000, $50,000 more than the anticipated outlay, and this explains the apparent discrepancy between the testimony of Stein (S C., p. 29, l. 36) and Weisenfeld, *supra,* for Stein testified to the actual cost.

The learned court below refers to two letters written by appellant to respondent, which suggested that if the appellant would be permitted to obtain the proceeds of $100,000.00 mortgage to be executed by respondent, it would be willing to pay an increased rental of $1,000.00 a year. Inasmuch as all interest had, under the terms of the lease, to be paid by the appellant over a period of fifty years, the increased rental, totaling $50,000.00 would exactly equal the increased amount of the mortgage of $50,000.00. At most, this was only an offer made by the appellant to the respondent looking for further negotiations. It is difficult for appellant to understand how these two letters constitute, in the language of the Court, duplicity toward the Court and an attempt to overreach the defendant. Appellant maintains most strenuously that the doctrine of clean hands was never intended to apply to a situation where one party to a contract seeks a legal interpretation of a contract the terms of which are in dispute. The application of this doctrine in such a situation would create undue fear in the minds of complainants seeking equitable relief, and the threat that an application for legal interpretation of their contractual rights might disentitle them to any equitable relief, would create havoc in the business world.

It is submitted, therefore, that the appellant's conduct throughout the entire transaction has been equitable and fair; that it has not been guilty of any duplicity toward the Court nor of any attempt to overreach the respondent, and that it should not be precluded from equitable relief because of the assertion of its legal right to have an interpretation of its contractual rights from a court of equity.

CONCLUSION.

It is respectfully submitted, therefore, that the appellant, being entitled to a decree requiring the respondent to execute the bond and mortgage without a decision at this time as to which party is ultimately responsible for the mortgage debt; and being entitled under the lease itself to have the respondent assume the ultimate liability for said mortgage debt; and being entitled to have all evidence of conversations had at the time and prior to the execution of the written lease stricken out; and being guilty of no impropriety of conduct disentitling it to equitable relief, the appellant is entitled to have the decree of the court below reversed and a decree entered pursuant to the prayer of the bill of complaint.

Respectfully submitted,

JACOB L. NEWMAN,
Solicitor for and of Counsel
with Complainant.

LIONEL P. KRISTELLER,
SAUL J. ZUCKER,
On the Brief.

February, 1930, Term.

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

New Jersey Court of Errors and Appeals

Between

JOURNAL PLAZA HOLDING CO., a corporation,
Complainant-Appellant,

and

J. L. H. COMPANY, INCORPORATED, a corporation,
Defendant-Respondent.

On Appeal from Court of Chancery.

REPLY BRIEF OF APPELLANT.

Foreword.

The appellant has annexed hereto a copy of an affidavit on file in this court, containing the reasons for its failure to include in the State of the Case the matters mentioned in the respondent's Objections to the State of Case.

Argument.

The appellant considers it advisable to make this reply to two of the points raised in the respondent's brief. As both points are generally treated in the appellant's original brief, little space will be devoted to either. The two points raised by the respondent, and to which reply will be made, are:

A. The appellant's right to specify performance under the circumstances of the instant case; and

B. The impropriety of conduct as set forth by the respondent.

I.

The brief of the respondent devotes no less than twenty-seven pages (pp. 15-42), in a verbatim quotation from its memorandum submitted to the Vice-Chancellor below, to support the proposition it there made, that the lease was too indefinite to permit a decree of specific performance of that part which relates to the execution of the mortgage. It is submitted that the court below dealt in a most equitable manner with this feature of the case when it said that equity would strain to decree specific performance of a contract in which one party's duties had been and were being performed under the contract (S. C., p. 14, l. 39). In addition to this, however, it is important to note that while the respondent was in the possession of information as to the terms of the mortgage with particular reference to the duration, rate of interest and form of mortgage to be drawn as early as February 17, 1929 (S. C., p. 107) by a letter from Jacob L. Newman, and February 20, 1929, (S. C., p. 131) by a letter from the Mutual Benefit Life Insurance Company, yet, in spite of this information, it never informed the appellant or its solicitor that it objected to any of the mortgage terms, and did not, strange as it may seem, object to these terms even in its answer; but in what it terms an equitable code of conduct, waited until the hearing of the cause on May 2, 1929, and then, for the first time, raised the point that it was not bound to specifically perform the provisions of the lease relating to the execution of the bond and mortgage because of its indefiniteness. If appellant was entitled to relief for no other reason but because of respondent's conduct, it should clearly be sustained on the ground that if respondent had any reason to object to the mortgage that was being

prepared, it should have objected between February 20, 1929, when it knew of the terms and May 2, 1929, the date of the hearing, and its failure to object must constitute a waiver or an estoppel.

In the letter from respondent's solicitor to appellant's solicitor, April 13, 1929, respondent wrote as follows:

> "* * * My clients are ready and willing to execute the $50,000.00 mortgage now in question, provided the terms and conditions are in accordance with the lease and the intent thereof. *The consummation of the bond and mortgage placing the obligation on the J. L. H. Co. to assume the payment of the principal of this mortgage is not in accordance with their undertakings and intentions and which fact they claim can be verified by Mr. Weisenfeld and prior parties in interest.*" (Italics ours.) (S. C., p. 129.)

This letter clearly stated that the reason for non-performance was the assumption of payment of the mortgage debt. Would not fair dealing, frankness, and candor have demanded that after knowing since February 20, 1929 what the terms of the mortgage would be, and after April 9, 1929 (S. C., p. 111), the date upon which respondent actually received the bond and mortgage to be executed, that it would have stated in no uncertain language their objections to the specific features of the mortgage? Would not impropriety of conduct in and to the court below have demanded that, in its answer, its specific objections to the mortgage be stated, instead of postponing them only to raise them at the hearing? Did not appellant have a legal right to assume from all the correspondence in the case, from the actions of the parties, and from the very answer itself, that the only objection to the execution of the mortgage as contemplated and

presented, was that there was no provision relieving the respondent from ultimately paying it? It seems that the captious objections to the terms of the mortgage were raised by the respondent not as a reason but as an excuse for non-performance. The attitude of the respondent displayed by its letter of April 13, 1929 indicated that it waived everything but the objection contained in the letter. (*Harrington Co.* v. *Kadrey,* 105 N. J. E. 393-399. Decided in Court of Chancery December 17, 1929.)

This point is stressed only to supplement the action of the court below, when it properly determined that the respondent's technical objections to executing the bond and mortgage could not stand, while they were themselves reaping the benefits of the appellant's performance under the lease.

II.

The second point which is somewhat similar to the point just made, but in certain aspects somewhat different, refers to the attitude of the respondent in the course of the litigation. The respondent has devoted almost one quarter of its brief in endeavoring to establish the inequitable conduct of the appellant. It is not amiss at this point to mention, that although as early as November 9, 1928 (S. C., p. 102) when the respondent was notified that arrangements to raise a mortgage were being made, and on January 18, 1929 (S. C., p. 106) when respondents were advised that a mortgage loan has been obtained from the Mutual Benefit Life Insurance Company, it did not object to the execution of the bond and mortgage. During this period, and on January 11, 1929 respondent's solicitor wrote a

letter to an officer of the respondent, (S. C., p. 135), which for the convenience of this court, appellant prints in full:

"Mr. Louis Holste,
Holste Platt Co.,
372 Mercer St.,
Jersey City, N. J.

Dear Louis:—

Mr. Jacob L. Newman, a local attorney, called me this morning and stated that Mr. Weisenfeld had been granted a loan of $50,000. by one of his clients and wanted to know why we objected to signing a mortgage of $100,000.

I told him that I had no real final decision in the matter, however, that my clients did not feel that they would care to sign a mortgage for any amount larger than what they were obligated in the lease. He said that he would call me up when the mortgage transaction was ready in order that I could arrange to have the mortgage signed.

I am writing this letter for your information as there is nothing which it is necessary for us to do at this time, except to wait until we have heard from them. If, however, they realy mean business and are going through with the mortgage at $50,000., we should prepare a resolution by the corporation authorizing the execution of the lease. (Italics ours.)

Very truly yours,
HENRY SCHLITTENHART"

During this entire period, no litigation was threatened, and the parties were speaking their true minds. Never once did the respondent intimate that it would not sign the bond and mortgage, and it was only after the solicitor of the appellant had written to the solicitor of the respondent, on April 9, 1929 a letter which con-

tained a statement that legal proceedings would be resorted to, that respondent acted:

> "This matter has been pending for a long time, and patience has ceased to be a virtue. If your clients, for any reason are unwilling to execute these papers and complete this matter, please notify me within the next forty-eight hours, or deliver the papers properly executed and let us consummate the transaction. If I do not have the papers returned to me within the time above, properly executed together with the cancelled mortgage I shall advise my client of the situation and start such legal proceedings on their behalf as I think equitable and just.
>
> I trust this, however, may not be necessary, but wait to hear from you further with regard to the matter" (S. C., p. 112).

Then the respondent based its refusal on the fact that they would sign no papers whereby they assumed payment of the principal of the mortgage. Proceedings were subsequently started on April 19, 1929, after appellant has been apprised of the respondent's attitude as stated in its letter of April 13, 1929 (S. C., p. 129).

It is submitted that the respondent's refusal to execute the bond and mortgages might have been predicated upon a desire to obtain an advantageous price in a sale of the premises to the appellant, negotiations of which had been pending (Exhibits C. 8, 9, 10, S. C., pp. 103, 104, 105).

It is common knowledge that correspondence written before any contemplation of a legal proceeding has much greater weight in determining the attitude of the writer, than that after threat of legal proceedings. In this respect it is most important to note that not until April 13, 1929 after legal proceedings had been threatened, did the respondent evince any intention of evading its duty to execute the bond and mortgage, while

prior to the threat of legal proceedings, there was never any question as to its duty to execute the proper papers. The state of mind of the respondent can most minutely be found in the letter from its own solicitor to itself, printed in full above.

For these additional two reasons, then,

1. that the respondent is estopped from questioning the details of the mortgage submitted to it, and

2. that the respondent's own actions do not entitle it to favorable consideration at the hands of this court, the appellant submits that it is entitled to relief sought in the court below.

Respectfully submitted,

JACOB L. NEWMAN,
Solicitor for and of Counsel
with Complainant-Appellant.

LIONEL P. KRISTELLER,
SAUL J. ZUCKER,
On the Brief.

February, 1930, Term.

AFFIDAVIT.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOURNAL PLAZA HOLDING CO., a corporation, *Complainant-Appellant,* *and* J. L. H. COMPANY, INC., a corporation, *Defendant-Respondent.*	*On Appeal, etc.* *Affidavit.*

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

JACOB L. NEWMAN, being duly sworn, on his oath, according to law, deposes and says:

I am the solicitor for the complainant-appellant in the above entitled cause, and have read the Notice of Motion to correct the State of the Case, Petition to Correct the State of the Case, and Affidavit on Motion to Correct the State of the Case, which have been served upon me by the solicitor of the defendant-respondent.

In answer thereto, deponent says that upon being apprised by the solicitor of the defendant-respondent that he objected to the matter set forth in the petition, he immediately corrected the error in each of the printed State of the Case, with reference to the fifth objection wherein in answer to a question, the printed State of the Case failed to contain the word "not", and deponent by letters, copies of which are hereto annexed and made part hereof, notified the solicitor of the respondent to such effect, as the error was a typographical one, and was inad-

vertently made by the printer, in failing to insert the answer correctly in the printed copy.

As to the First, Second, Third and Fourth objections, being

(A) The failure to put in the State of the Case the complainant's affidavit supporting the bill upon which the rule to show cause was issued.

(B) The failure to include the Rule to Show Cause issued upon filing the bill.

(C) The failure to make mention of the Answering Affidavits of the defendant.

(D) The failure to make mention of the Notice of Motion made by the defendant to vacate the Rule to Show Cause and restraining Order; deponent does not believe that they are properly part of the State of the Case, as the decision of the Court below was made after final hearing upon the bill, answer, replication and testimony in open Court, which are the only essential requisites in the State of the Case for the proper determination of this appeal.

Deponent has not included in the State of the Case, nor has the solicitor of the respondent sought to have included therein the Order of the Court below upon the motion to vacate the Order to Show Cause, said order being simply that decision thereon would be reserved until the final hearing in the cause, a copy of which is hereto annexed and made part hereof.

The appeal in this cause is not from any interlocutory order or any order based upon the voluminous affidavits filed with the bill of complaint, or in answer thereto, but is from the Final Decree made after the pleadings and proof in open court.

JACOB L. NEWMAN.

Subscribed and sworn to before me,
this 1st day of February, 1930.

SAUL J. ZUCKER,
A Master in Chancery of New Jersey.

January 17, 1930.

Mr. John Trier,
776 Broad St.,
Newark, N. J.

Re: Journal Plaza *v.* J. L. H. Co.

My dear Mr. Trier:

In the objections to the State of the Case which you served upon me, under your fifth objection, I have examined the original stenographic record, and also the printed State of the Case, and having ascertained that you are correct, and that the printer has inadvertently left out the word "not" in the Answer, I shall correct the State of the Case to conform with the stenographic record, and insert in each State of the Case, the word "not", in the proper place.

I merely thought I ought to notify you of this as a matter of courtesy, because, of course, the printed State of the Case should in all respects conform to the stenographic record.

With kind, personal regards, I am

Yours very truly,

JACOB L. NEWMAN.

N:G

January 20, 1930.

Mr. John Trier,
776 Broad St.,
Newark, N. J.

Re: Journal Plaza *v.* J. L. H. Co.

My dear Mr. Trier:

I thank you for your letter of the 18th instant, in the above matter, and answering the same would say, I do not think that a stipulation to the effect that Demand No. 5 in your objection to the State of the Case has been rectified, need be signed, as long as the correction has been made in the State of the Case itself.

As to your other objections to the State of the Case, I do not think they are valid, as in my view, neither the complainant's affidavits annexed to the bill of complaint, the order to show cause, the answering affidavits of the defendant, nor the notice of motion to vacate the order to show cause, all embraced in the first four objections to the State of the Case, nor in fact the order of the Vice-Chancellor upon your motion, reserving decision thereon until final hearing (which you do not mention in your objections), are properly part of the State of the Case, and are unnecessary to proper determination of the issues involved.

Yours truly,

JACOB L. NEWMAN.

Z:G

IN CHANCERY OF NEW JERSEY.

JOURNAL PLAZA HOLDING CO., a corporation, *Complainant,* *and* J. L. H. COMPANY, INC., a corporation, *Defendant.*	*On Bill, etc.* *Order on Motion to Strike Out Bill of Complaint.*

A motion having been made by the defendant, J. L. H. COMPANY, INC., to strike out parts of the bill of complaint filed in this cause; and it appearing that due notice of said motion has been given to the said complainant; and the matter coming on to be heard in the presence of JACOB L. NEWMAN, solicitor of said complainant, and of JOHN TRIER, solicitor of said defendant, and the Court having heard the arguments of the said solicitors, and being of the opinion that the decision of said motion should be deferred until the final hearing by this Court; it is, on this thirtieth day of April, nineteen hundred and twenty-nine,

ORDERED, that the said motion be and the same is hereby continued until the final hearing of this cause and the further Order of this Court in the premises.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

New Jersey Court of Errors and Appeals

JOURNAL PLAZA HOLDING CO., a corporation, Complainant-Appellant, vs. J. L. H. COMPANY, INC., a corporation, Defendant-Respondent.	On Appeal from the Court of Chancery.

BRIEF FOR DEFENDANT-RESPONDENT.

Statement of Facts.

The respondent controverts the statement of the case presented by the appellant and therefore here presents its own statement thereof.

On or about September 25, 1925, respondent, a corporation of the State of New Jersey, entered, as lessor, into a certain written lease (Case, p. 83, Exhibit C-1) with one Matthew J. Makaus as lessee. At this time the premises in question were occupied by certain buildings occupied by tenants (p. 89, ll. 9 to 18). The respondent corporation at that time, as well as at all times since, was and has been composed of three brothers named Holste, who constituted and constitute all the stockholders, all the officers and all the directors of the corporation, except that during a brief period the wife of one of them became a transferee of her husband's stock holdings and a director (p. 61, ll. 19 to 32).

The lease was prepared by William E. Sewell and Julius L. Reich, partners in the practice of law and solicitors of this court, at their office in Jersey City (p. 37, ll. 20 to 23; p. 45, ll. 8 to 28). It does not appear whom, if anyone, Messrs. Sewell and Reich represented as attorneys in the transaction, except for the statement of Mr. Makaus (p. 78, ll. 27 to 30) that he "believed they were representing the Holstes." It appears without contradiction that it was Messrs. Sewell and Reich who brought the parties together (p. 78, ll. 21 to 32).

All six of the persons named—Mr. Sewell, Mr. Reich, the three Holstes and Mr. Makaus—were present at the office of Sewell and Reich, discussing the terms of the bargain and conferring with Messrs. Sewell and Reich as to the drawing up of the lease (p. 37, ll. 20 to 28; p. 45, ll. 8 to 28; p. 67, ll. 20 to 24; p. 70, ll. 22 to 34; p. 77, ll. 8 to 24). Further, it appears by the testimony of all of them, without contradiction, that it was the understanding of all the parties that the mortgage of not over $50,000.00, the execution of which was provided for in the lease, (p. 87, l. 26, to p. 88, l. 12) (and with which the present litigation is solely concerned), was to be the primary obligation of the lessee Makaus and was to be paid off by him—"amortized"—during the term of the lease (p. 40, ll. 1 to 14; p. 43, l. 29, to p. 44, l. 37; p. 47, ll. 3 to 27; p. 62, ll. 3 to 36; p. 68, l. 1, to p. 69, l. 9; p. 71, l. 1, to p. 72, l. 10; p. 77, l. 37, to p. 78, l. 19).

Thereafter, said Makaus assigned his interest as lessee under the lease to one Andrew J. M. Reich (p. 93, Exhibit C-2); and the said Reich in turn assigned his interest to one Samuel B. Weisenfeld (p. 95, Exhibit C-3); upon what consideration does not appear. Weisenfeld was the secretary of Journal Plaza Holding Co., a corporation of this state, and the appellant in this cause, and his father-in-

law Stein was the president of that corporation. Stein, or the two together, owned and own practically all of the corporation's stock, and, in effect they were and are that corporation, just as the Holstes were and are the respondent corporation (p. 29, ll. 12 to 15, and ll. 38 to 40; p. 80, ll. 11 to 19, and ll. 26 to 35). Thereafter Weisenfeld assigned his interest under the lease to said appellant corporation (p. 98, Exhibit C-4).

Messrs. Sewell and Reich both testify that they, apparently now representing the lessee of the lease, negotiated with Weisenfeld, acting for his father-in-law and the corporation they owned, the assignment of the lease to the latter, and discussed fully with him its terms, among others the fact that the understanding of the parties and intention of the lease was that the proposed mortgage was to be the primary obligation of the lessee, and was to be paid by him (p. 48, l. 28, to p. 49, l. 31; p. 50, l. 8, to p. 51, l. 24). Weisenfeld denies this (p. 81, l. 1, to p. 82, l. 12).

At the time of the assignment of the lease to the appellant, the buildings which were on the premises in question at the time of the execution of the lease had been removed, presumably by the original lessee or one of his successors in interest, though by whom does not appear (p. 29, ll. 20 to 21). Stein, or his corporation, or Weisenfeld for them, according to their testimony, paid to Andrew Reich (assignee of the lease, and not to be confused with Mr. Reich of Sewell and Reich) $25,000.00 for the transfer of his interest in the lease (p. 29, ll. 38 to 39; p. 81, ll. 34 to 36). Thereafter, they proceeded to erect a building on the premises, expending in the erection thereof, according to Stein's testimony, $150,000.00 (p. 29, l. 36, to p. 30, l. 2).

Some time before, and during, the construction

of appellant's building, conversations, casual and otherwise, began to take place between Weisenfeld and Stein on the one hand and the Holstes, or some of them, on the other, concerning the execution and raising of funds under the mortgage mentioned in the lease, (p. 62, l. 36, to p. 64, l. 35), the maximum amount of which, as has been seen, had been fixed by the lease at $50,000.00 (p. 87, l. 31, to p. 88, l. 1).

Correspondence on the subject also took place between the parties, and it appears therefrom that no controversy had yet arisen as to the terms of the mortgage or the liability for the payment thereof; whatever discussion there was appears to have related to a proposal by Weisenfeld and Stein to increase the amount of the mortgage from $50,000.00 to $100,000.00, they proposing in return for this concession to pay an additional $1,000.00 rent per year to the landlord. This proposal was rejected by the respondent.

During all this time (and up to January 11, 1929) the appellant seems to have been acting almost entirely through Mr. Weisenfeld, who is also a solicitor of this court. On November 19, 1928, a letter from Mr. Schlittenhart, who then was and for some time past had been acting as attorney for the respondent corporation, definitely declining to permit the mortgage to be increased to $100,000.00, was sent by him, on the respondent's behalf, to Mr. Weisenfeld. There followed further correspondence between Mr. Weisenfeld and Mr. Schlittenhart and also between Mr. Weisenfeld and the Holstes, in which Weisenfeld further pressed his proposition, until finally, on January 5, 1929, the respondent, speaking by Louis H. Holste, definitely rejected the proposition, and this was again confirmed by a letter under date of January 11, 1929 from Mr. Schlittenhart to Mr. Weisenfeld (p. 64,

l. 36, to p. 65, l. 25; p. 143, Exhibit D-13; p. 102, Exhibit C-7; p. 142, Exhibit D-12; p. 140, Exhibit D-11; p. 139, Exhibit D-9; p. 103, Exhibit C-8; p. 104, Exhibit C-9; p. 138, Exhibit D-8; p. 105, Exhibit C-10).

On January 11, 1929, (p. 135, Exhibit D-4) there first appeared upon the scene, so far as respondent was made aware, a new representative of the appellant, Mr. Jacob L. Newman, also a solicitor of this court, and who has ever since represented and still represents the appellant in the present litigation. On the date last mentioned, he communicated with Mr. Schlittenhart, and evidently attempted to obtain a re-consideration of the respondent's refusal to increase the mortgage to $100,000.00, only, however, to be met by another refusal (p. 135, Exhibit D-4). This appears to have been the last effort upon the part of the Appellant to obtain this increase; and it appears that upon Mr. Schlittenhart's refusal, Newman stated that his client would now proceed to obtain a loan of $50,000.00, and would notify Mr. Schlittenhart when the papers would be ready for execution by the latter's client. There still, it appears, was no controversy or even discussion as to the terms of the proposed mortgage, or the liability for the payment of the principal thereof (p. 135, Exhibit D-4). Now, however, the picture changes.

On January 18, 1929—just a week after Schlittenhart's letter to Weisenfeld and Newman's interview with Schlittenhart—Weisenfeld writes to Mr. Schlittenhart that "we (the appellant) have obtained a mortgage loan of $50,000. on our property from the Mutual Benefit Life Insurance Company" (p. 106, Exhibit C-11). This statement was, however, untrue. It appears without contradiction that what really had happened was that Newman, on January 10, 1929, made, to the Mutual

Benefit Life Insurance Company, of Newark (hereinafter called the Insurance Company), an application for a mortgage loan of $50,000., representing such application, falsely, to be on behalf of the respondent, J. L. H. Company, signing the application himself, representing himself, falsely, to be the attorney for said J. L. H. Company (p. 132, Exhibit D-3). Eight days later, on January 18, 1929, he wrote to Mr. Schlittenhart stating that "I have procured a loan from the Mutual Benefit Life Insurance Company of $50,000. * * * and I will arrange, as soon as the search is complete, and we are ready to close the matter, for your client to execute the mortgage." No mention is made by him of the fact that the application purported to be in the name of respondent, Schlittenhart's client, or that he, Newman, had represented himself to be its attorney authorized to make such an application (p. 136, Exhibit D-5). It further appears that his statement that he had procured a loan was untrue, as the loan was not granted until January 23 (p. 134, l. 20).

On February 16, 1929 (p. 107, Exhibit C-12), Newman writes to Schlittenhart concerning the details of the execution of the mortgage by Schlittenhart's client—still making no mention of the facts as to the application, and using the significant words "relative to the company which you represent *joining* in the mortgage" (italics ours). Prompted, obviously, by this letter, Mr. Schlittenhart, under date of February 18, 1929, wrote to the Insurance Company, inquiring concerning the terms of the proposed mortgage—still, as appears from his letter, under the impression that the application had been made by the Journal Plaza Holding Co., and that his client, the J. L. H. Company, had been "asked to *join in* under the terms

of the lease" (p. 130, Exhibit D-1) (italics ours). To this letter the Insurance Company answers, on the following day, February 19, 1929, (p. 131, Exhibit D-2), stating the term and rate of interest of the proposed mortgage, but—though innocently, we have no doubt—making no mention of the all important fact that the application purported to be made on behalf of the J. L. H. Company, and that it, the Insurance Company, understands the respondent to be the proposed maker of the mortgage. Some time between the date last mentioned and April 13, 1929, and no doubt early in that month (p. 36, ll. 12 to 18) Mr. Schlittenhart called at the office of the Insurance Company and learned the facts concerning the application for and the proposed terms of the mortgage. On April 9, 1929, Newman sent to him the letter of that date (p. 111, Exhibit C-15) which is in the nature of an ultimatum, demanding execution of the papers within forty-eight hours under threat of legal proceedings. On the same day, April 9, 1929, Schlittenhart requested a short extension of the time set in the ultimatum (p. 128, Exhibit C-17); and within four days he definitely rejected it, and confirmed this rejection by his letter of April 13, 1929 (p. 129, Exhibit C-18).

Thereupon the appellant, as complainant, filed its bill in the present litigation in the Court of Chancery. Annexed thereto was an affidavit by Stein, its president; this affidavit the appellant has refused to print in the State of the Case, and a motion to compel its inclusion therein has been noticed before this court and will be moved on the opening day of the term. A "rule" to show cause, with restraint, was thereupon made by the Court of Chancery; this order the appellant has also refused to print, and a motion to compel its inclu-

sion is also pending. The respondent, as defendant in the Court of Chancery, filed full answering affidavits, and made a motion to vacate the order of the Court of Chancery; these affidavits and the notice to vacate and proof of service thereof the appellant has also refused to print, and motions to compel their inclusion in the state of the case are also pending.

Upon the return day of the order, Vice Chancellor Backes, instead of then passing upon the matters involved in these affidavits, set the case down for practically immediate final hearing. Such hearing was had; briefs were filed; and, as a result, an opinion was filed, and a decree made, dismissing the bill of complaint on the grounds that the complainant was not equitably entitled to the relief of specific performance, and came into court with unclean hands (pp. 12 to 18 and pp. 22 to 23). From the decree so entered the present appeal has been taken.

In concluding this statement of the case, as the exhibits were introduced in evidence, and consequently appear in the state of case, in a somewhat haphazard order, we here give for the assistance of this court a table showing the chronological order of these exhibits:

Chronological Table of Exhibits.

1. September 25, 1925, Execution of lease
   Page 83, Exhibit C-1
2. February 14, 1927, Assignment of lease from lessee Makaus to Andrew J. M. Reich .....Page 93, Exhibit C-2
3. October 13, 1927, Assignment of lease from lessee by assignment, Andrew J. M. Reich, to Weisenfeld
   Page 95, Exhibit C-3

4. July 10, 1928, Assignment of lease by assignee of lessee Weisenfeld to appellant) .....Page 98, Exhibit C-4

5. November 1, 1928, Letter from Schlittenhart (for respondent) to Weisenfeld (for appellant) Page 143, Exhibit D-13

6. November 9, 1928, Letter from Weisenfeld (for appellant) to Holste (for respondent) ..... Page 102, Exhibit C-7

7. November 19, 1928, Letter from Schlittenhart (for respondent) to Weisenfeld (for appellant) Page 142, Exhibit D-12

8. November 20, 1928, Letter from Weisenfeld (for appellant) to Schlittenhart (for respondent) Page 140, Exhibit D-11

9. December 26, 1928, Letter from Weisenfeld (for appellant) to Schlittenhart (for respondent) Page 139, Exhibit D-9

10. December 31, 1928, Letter from Weisenfeld (for appellant) to Holste (for respondent) .....Page 103, Exhibit C-8

11. January 5, 1929, Letter from Holste (for respondent) to Weisenfeld (for appellant) .....Page 104, Exhibit C-9

12. January 9, 1929, Letter from Weisenfeld (for appellant) to Holstein (sic.; should be Holste) (for respondent) .....Page 138, Exhibit D-8

13. January 10, 1929, Application by Newman (for appellant; but purporting to be for respondent) for mortgage loan to Mutual Benefit Life Insurance Co. .....Page 132, Exhibit D-3

14. January 11, 1929, Letter from Schlittenhart (for respondent) to Weisenfeld (for appellant).Page 105, Exhibit C-10

ARGUMENT.

A.

Answer to arguments and allegations under the heading "Facts" in Appellant's brief.

The so-called statement of the case in appellant's brief contains much that is purely argument; and there are also a number of allegations of fact that are untrue.

At page 2 of its brief, appellant says that it "applied for, and procured from the Mutual Benefit Life Insurance Company * * * the grant of a mortgage loan." This is untrue. As we have already pointed out in our statement of facts, the uncontradicted testimony is that what the appellant did was to make an application to the Insurance Company for a mortgage loan purporting, falsely, to be on behalf of the respondent, such application being signed by appellant's solicitor, Newman, falsely representing himself to be the attorney of the respondent; all this, of course, without the respondent's knowledge.

At page 3 of its brief, beginning of first paragraph, appellant says that "The respondent refused to execute the bond and mortgage, contending that because the lease did not contain the terms of the mortgage as to amount of interest, duration and default, it was too indefinite to be specifically enforced. The learned Vice-Chancellor below, terming this conduct on the part of the respondent as the advancement of a technical defense, refused to apply the doctrine sought" etc.; and again, beginning with the last paragraph on the same page, "defeated in its effort to thwart the appellant from

reaping the benefits of its contract upon a technicality of this character, the respondent then relied upon its interpretation of the lease * * * * that the ultimate liability to discharge the mortgage debt was the appellant's and not the respondent's * * * and near the conclusion of the hearing went so far as to move for a reformation of the original lease" etc. This is all out of the whole cloth. Nothing of the sort happened. The respondent's position, beginning before the litigation began (p. 129, Exhibit C-18) and consistently thereafter, was, and is not only that the lessee is under the lease to be the principal debtor of the mortgage, upon whom liability for the payment of its principal rests, and the lessor is only to join in the mortgage so as to pledge the entire fee for the loan to be raised by the lessee, but, further, that such mortgage so to be joined in by the lessor must be, under the terms of the lease, for the entire term of said lease, not for five years or any other term less than the entire term of the lease, nor with any clause or clauses providing for acceleration of payment of the principal. As the Court of Chancery said in its opinion (p. 18, ll. 10 to 11); "it (defendant's) claim that the lease should be interpreted to the effect that 'the complainant eventually was to pay the debt' (p. 17, l. 33) was the principal issue at the hearing, tried and decided." It certainly was. It not only was the principal issue tried, but, as the record shows, there was practically no other issue considered in the examination of the defendant's witnesses, from the beginning of the hearing to its end. The Court of Chancery, in its opinion, appeared to think that the issue was not sufficiently raised by the respondent's (defendant's) answer, and suggested an amendment thereto; (p. 17, l. 30, to p. 18, l. 13)

and in deference to that opinion, respondent applied for and obtained an order making such an amendment. With all due deference to the Court of Chancery, we think, however, that the defense was sufficiently raised by our original answer. This, however, is a mere question of pleading, and we do not stress it.

As to the application to add a counterclaim to the defendant's answer praying a reformation of the lease in accordance with its true intent, this also was done purely in response to a suggestion by the learned Vice Chancellor who heard the case (p. 72, ll. 33 to 34), and it was made immediately thereupon. The court's suggestion was the last thing occurring on the first day of the hearing, May 2, 1929; and immediately upon the opening of the next day of the hearing, and before any testimony whatever was taken, defendant's solicitor made the suggested application (p. 73, l. 22 to p. 75, l. 2). Again, this also was done in deference to the suggestion of the Vice Chancellor; and we thought at the time, and still think, that it was unnecessary; but this, too, is a mere matter of pleading.

The appellant here apparently seeks to make much of the fact that this respondent in the Court of Chancery (in its brief filed with that court) raised what that court called a "technical defense" to the form of the mortgage tendered to it for execution. The double answer to that contention is that these objections were not raised as a defense in themselves; but that if they had been so raised, they would be valid, for they relate to substance, and not to form.

The mortgage tendered, execution of which is sought to be compelled by the appellant's bill, is for a term of five years, with provisions for accel-

eration of payment of principal upon default in payment of interest or taxes, etc. The respondent's contention, as we have already stated, was and is that not only was respondent not to be the debtor, but that the only mortgage in which it could be properly called upon to join with the appellant would be one for a term equal to the duration of lease, as evidenced by the provision of the lease that it should "remain a lien"; and its contention was and is that it could be compelled to execute a mortgage for a lesser term only by entirely disregarding this provision of the lease, whereupon there would remain no provision whatever fixing the term of the mortgage, and, *in this situation,* the doctrine that the agreement was too indefinite for specific performance would apply. The opinion of the Court of Chancery on this subject (p. 14, ll. 20 to 32) must be read in the light of this argument. We here quote it verbatim from our brief filed in the Court of Chancery:

> "The complainant offers no argument, to say nothing of authority, to the effect that, under the provisions of the written lease, the defendant was or is bound to execute such a mortgage as has been tendered to it—a five year mortgage, with covenants for acceleration of payment of principal in case of default in payment of interest or taxes, and against tax deduction claims. * * *
>
> We need not again call attention to the fact that not only is the lease silent as to who is to pay the principal of the mortgage, and as to the rate of interest to be paid, but no due date is mentioned. We submit that the language of the lease as written—"that the said bond and mortgage shall remain a lien upon the said demised premises" means that the mortgage is not to become due until the expiration of the lease, including the re-

newal thereof if the option to renew is exercised by the lessee; and that this conclusion can only be escaped by disregarding this language entirely, and considering it as stricken out. But, if the latter course be followed, then it is well settled, not only in this state, but in other jurisdictions, that specific performance of the agreement cannot be had at all.

In Turkington v. Zuber, 100 N. J. Eq. 285, the Court of Errors and Appeals in reversing the decree of this court granting specific performance of a contract for the sale of real property said, at page 287:

"Specific performance will not be decreed unless the existence and essential terms of the contract be clearly proved. * * * Nor will it (equity) interfere when the evidence leaves the agreement as to any of its essential terms in uncertainty."

In Nichols v. Williams, 22 N. J. Eq. 63, specific performance was sought of a contract for the conveyance of lands which provided, among other things, that the defendant should pay the purchase price thereof "by executing two mortgages upon the property conveyed to him, one for $50,000., and the other for $9500. It was not stated when these mortgages were to be payable, or whether with or without interest, or at what rate of interest; nor was it stated in the bill to whom they were to be made, except by stating that they were to be in favor of and for the benefit of the party of the first part to the agreement; the bill not stating who was the party of the first part."

Chancellor Zabriskie, in sustaining a demurrer to the bill, said, beginning at page 64:

"Specific performance will not be decreed of any contract, when any material part of

the terms or conditions are uncertain. In this case, two mortgages for large amounts were to be given, one for $50,000., the other for $9500. It is evident that some time was to be given for the payment of these, and probable that some interest was to be allowed. The time and the interest are both material. Neither is settled; both are to be ascertained by subsequent negotiations. A mortgage for $50,000, payable on demand, or one day after date, or a mortgage conditioned to pay that sum ten years after date, with no mention of interest, or with interest at two or seven per cent., would each comply with the terms of the contract stated in the bill. This is the same, practically, as a contract to pay a certain sum on *terms or credits* to be arranged between the parties. In the case of McKibbin v. Brown, 1 McCarter 13, Chancellor Green refused to decree specific performance of the agreement, certain in every other respect, except that the terms or credits were to be agreed upon by the parties. He construed terms or credits to mean *credits* only. The case of McKibbin v. Brown is the application, to facts like these before me, of the well-settled doctrine above stated, which that case itself, and the authorities cited in the opinion of the Chancellor, clearly establish. It is very clearly expressed in a passage quoted by the Chancellor, from a judgment of Lord Rosslyn: 'I lay it down as a general proposition, to which I know no limitation, that all agreements, in order to be executed in this court, must be certain and defined.' This doctrine was acted on again in this court, in King v. Ruckman, 5 C. E. Green 316. In that case, part of the premises to be conveyed was described in the written agreement by these words: 'Also two lots of land in Hackensack township, county of Bergen;' without anything else in the contract to designate or

identify them. One of the grounds of dismissal of the bill was that this description was too uncertain; and, although this judgment was reversed by the Court of Appeals, yet the terms in which the opinion of the court on this point was announced, affirm the doctrine. The court say: 'Taking the contract, bill, and answer together, it can be made to appear with sufficient certainty, without resorting to parol evidence, what lands were intended.' In that case, the certainty in the contract was not held to be immaterial, but that the uncertainty was remedied by the allegations in the bill and answer.

"In this case, there is no allegation in the bill on this matter. There is nothing by which the court can judge even, what terms as to credit and interest the complainant insists upon.

"The view taken of these two causes of demurrer, makes it unnecessary to consider the other question, whether the $10,000. stipulated for, must be considered as stipulated damages or as a penalty.

"The demurrers must be sustained."

In the present case, the complainant in its brief (at page 6) has itself called attention to the testimony of Mr. Sewell "that everything was so indefinite (as to amortization of the mortgage debt) that it was left in abeyance." The parallel to the language of the opinion just quoted is deadly.

In Moore v. Galupo, 65 N. J. Eq. 194, this court, in dismissing a bill praying specific performance of a contract to convey real property, said, beginning at page 199:

"The second contention of the defendant, resisting specific performance of this contract, is that the agreement itself is so uncertain and indefinite in its terms that this court cannot be assured of what the parties

intended and agreed to do, and is therefore unable to make a decree for specific performance.

"This objection is based on the clause which declares the manner in which payment of the purchase-price shall be made. The agreement is dated May 29th, 1901. By it the whole purchase-money is declared to be $54,000, which, it is provided, shall be paid by the defendant in the following manner: $250. on the day of the date of the agreement —May 29th, 1901; $250. on June 3d (then) next; $9,500. on the delivery of the deed to the defendant, on or before April 1st (then) next; and 'the remaining sum of $44,000. to be secured by mortgage or mortgages on said premises bearing six per cent. per annum interest'.

"The defendant insists that this contract is lacking in certainty and definiteness in respect to the terms of the purchase-price, which is one of the essential features of the contract; that the terms of the conract make it plainly manifest that the parties intended only part of the purchase-money to be paid in cash, and do not show in what mode the residue should be paid.

"In the case of McKibbin v. Brown, 1 McCart. 17, Chancellor Green said that no specific performance of a contract can be decreed in equity unless it be actually concluded and be certain in all its parts. If the matter still rests in treaty, or if the agreement in any particular be uncertain or undefined, equity will not interfere. The learned chancellor declared that this doctrine is uniformly recognized in all the cases, English and American. On appeal to the Court of Errors and Appeals the decree of the chancellor in that case was affirmed. S. C., 2 McCart. 498. In Brown v. Brown, 6 Stew. Eq. 651, the Court of Appeals declar-

ed that specific performance would not be decreed unless the existence and terms of the contract be clearly proved. If it be reasonably doubtful whether the alleged contract was finally closed equity will not interfere.

"The principle stated appears to be elementary. No decisions question it. The cases submitted to judicial determination present only questions whether the particular agreement sought to be enforced is in its terms so definite and conclusive that the rule does not apply. An examination of the decisions in this state which have applied or distinguished the application of the rule, will aid in the solution of the present dispute. In the McKibbin case, the contract in terms declared that the complainant should have the privilege of re-leasing the premises for a named sum, 'and that the times or credits to be given by the defendant (the lessor) to the complainant (the lessee) should be subject of arrangement between the parties'. Chancellor Green held that the credits to be given were of the essence of the contract; that this term was not certain or defined by the agreement, and that this court had no power to decree that the defendant should release the property for such credits of payment as this court should deem reasonable and just; that in such case this court would both make the contract and compel its performance, and he refused to aid the complainant, because of the uncertainty as to this phase of the transaction. His ruling was affirmed on appeal. In that case the contract by actual expression declared that credits were to be given, and that they were to be the subject of future negotiations between the parties. But the rule under discussion is not limited to contracts which in express terms declare that credit to be given shall be settled by

further bargaining. It has been applied in all cases where by either expression or inference from the words used it appears the parties have not settled the question of credit given by fixing upon a definite time for payment.

"In Potts v. Whitehead, 5 C. E. Gr. 55, the alleged contract was a written agreement that the complainant should for thirty days have the refusal of certain lands, which the defendant agreed to convey to him for $20 per acre. The terms to be $500 on execution of the deed and the balance on mortgage upon the land with interest at six per cent. The complainant claimed that he had sent the defendant a letter (copy of which was produced) saying he had twice attempted the tender of the first payment upon the agreement made between them, and would meet the defendant (at named hours and places) 'when I shall be ready to make tender of the money and execute the proper agreement thereupon'. Chancellor Zabriskie held (at p. 58) that if this referred to executing an agreement yet necessary to be made as to the time of payment of the bond and mortgage for the balance of the purchase-money, it showed that an important part of the essence of the agreement—the time for payment of that balance—was not yet agreed upon; that although this question, arising from the want of designation of any time when the great bulk of the consideration was to be paid, was not raised on the argument, it was too prominent to be passed without notice; that the situation left a substantial and material part of the contract yet open for negotiation; that it was a settled principle that equity will not enforce a contract, any material part of which has to be settled by negotiations between the parties. On appeal this judgment was affirmed by the court of appeals without, however, express-

ing any opinion on this point. S. C., 8 C. E. Gr. 515.

"In the case of Nichols v. Williams, 7 C. E. Gr. 63, the alleged contract was in writing, and the complainant thereby agreed with the defendant to convey lands for the price of $150,000. The defendant agreeing to pay that sum by conveying certain specified tracts of land, valued at $90,500, and 'by executing two mortgages upon the property conveyed to him, one for $50,000 and one for $9,500.' It was not stated when these mortgages were to be payable, or whether with or without interest, or at what rate of interest, nor to whom they were to be made. Chancellor Zabriskie held that it was evident that some time was to be given for the payment of the mortgages; that it was a material incident of the contract, left to be ascertained by subsequent negotiations; that a mortgage for $50,000, payable on demand, or one day after date, or a mortgage conditioned to pay that sum ten years after date would each comply with the terms of the credit stated in the bill, and he sustained a demurrer to the bill which sought to enforce the contract. In each of the two last cases the lack of certainty in the alleged contract in fixing the time when a credit to be given should terminate by payment of the purchase-price, was held to be fatal to the claim for its enforcement by specific performance.

"In Green v. Richards, 8 C. E. Gr. 32, the agreement was to sell a house and lot for $2,500, and 'when there is $500 paid, and the back rent, I will give a deed and take a mortgage for $2,000.' Chancellor Zabriskie recognized the force of the general rule that when credit is to be given and the contract omits to fix a time of payment, the contract is too uncertain to be specifically enforced. He differentiated this case from the preced-

ing cases of McKibbin v. Brown, Potts v. Whitehead and Nichols v. Williams, ubi supra, declaring that in those cases it appeared to be the intention of the parties that the time of payment should be postponed; that in the case before him there was no agreement that the purchaser should have any credit; that in such case the mortgage should be made payable on demand.

"Counsel for the complainant contends that the rule refusing specific performance where the contract gives a credit without fixing a definite time for payment, is only applicable to agreements which contain a clause expressly declaring that the terms of the credit to be given shall be the subject of future dealings between the parties, as in the McKibbin case. He claims that in all other cases this court should follow the declaration of Chancellor Zabriskie, in Green v. Richards, 8 C. E. Gr. 35, and prevent the defeat of a fair contract by a technical objection, by presuming that it was the intention of the parties to give no credit. In that case the learned chancellor considered the effect of the words of the contract before him, and declared that there was no agreement for time, and that the purchaser was not entitled to credit. Having thus ascertained that the agreement, as framed by the parties, gave no credit, there was no occasion for any presumption ascribing to them an intention not to give credit. The learned chancellor had himself decided that to be the legal effect of the face of the contract. This dictum of Chancellor Zabriskie does not seem to accord with the view expressed by the Court of Appeals in affirming Green v. Richards, 8 C. E. Gr. 540, where, on the point in question, the court declared that 'where nothing is said about the credit to be given, and *there are no circumstances from which an inference can be made that it was the in-*

tention of the parties that the time of payment should be postponed, the money is payable immediately'.

"Here is a clear declaration, by the unanimous voice of the Court of Appeals, upon a point directly in issue, that the circumstances of each case are to be considered to ascertain (if necessary, by inference) whether it was the intention of the parties that the time of payment should be postponed.

"In the case now under consideration, the clause in the contract which deals with the purchase-money is divided into different portions. It is, I think, quite evident that the parties had in mind one thing to be done with reference to the several installments (amounting to $10,000) that came due prior to or on the day of the delivering the deed, which were *to be paid;* and quite another thing regarding the residue ($44,000), which was '*to be secured* by mortgage or mortgages.' The portion of the purchase-money which it is provided should be paid was obviously intended to be paid in cash; the residue was just as obviously not intended to be paid in cash, but to be secured by mortgage for some unsettled, unagreed term of credit. This view is supported by the provision that the mortgage or mortgages should bear six per cent. per annum interest. If it had been intended that the mortgage or mortgages should be instantly payable, why provide that they should bear interest? A mortgage instantly payable would draw interest by operation of law, but a mortgage payable at a future time would draw interest only from the time the money came to be due, unless express provision therefor be made in the mortgage. The insertion of such an interest clause supports the inference that a credit was intended, and that this provision was necessary to entitle the complainant to interest on that part of the

purchase-money which was to be secured by mortgage.

"This inference is also supported by the fact that if it was intended that all the purchase-money should be instantly payable on the delivery of the deed, there was no occasion for any provision for a mortgage. In such case there would have been no 'remaining sum to be secured'.

"But the omission of the complainants' contract to fix a time of payment is not the only element of uncertainty which prevents its specific performance. That contract provides that the sum of $44,000 should be secured by a mortgage or mortgages. This phrasing leaves it uncertain whether one mortgage should be made, or what number of mortgages more than one. It does not prescribe whether, if more than one mortgage should be given, they were to be concurrent or successive liens, nor whether or not they should precede all other mortgages, nor what should be their precedence between themselves.

"It is plainly to be seen that these omitted matters were intended to be arranged between the parties when the mortgage or mortgages were to be given.

"These elements of uncertainty affect incidents of the contract which are of the essence of its obligation. This appears at once that it is attempted to formulate a decree for its specific performance. Counsel for complainant, in his argument, proffers himself ready to accept a decree
'made in the terms of the agreement for a mortgage at the rate of interest provided, and for the sum stipulated, without saying on the face of the mortgage whether it is on demand, or for a year, or for any other stated period,' &c.

"Counsel for the defendant at once replies that this proposition assumes that there is no difference between an agreement to pay money at a named time, and an agreement to secure it by mortgage. For such a mortgage as the complainant propose would, in legal effect, be payable at once, precisely as were the cash installments of the purchase-price, thus making the agreement an undertaking by the defendant to pay at once the whole purchase-price—$54,000—which the terms of their contract show was not intended by the parties.

"It may, I think, be well asked why, as the contract was to secure the remaining $44,000 by a mortgage *or mortgages,* the defendant should be obliged to give a single mortgage for the whole of the residue? The contract, in express terms, declares that the remaining purchase-money shall be secured by one or more mortgages, but it fails to reserve to either party the right to decide which it shall be—one mortgage or two, ten or forty-four. Both parties must come to one mind as to this incident before the contract can be enforced. As they have not done so, it is apparent that the court cannot settle this incident by its decree for specific performance. To do this would impose upon one party or the other the acceptance of a term which was not finally agreed upon in their dealings and not expressed in their agreement. In short, the complainant asks the court both to make a contract and decree its performance.

"The agreement is, in the essential particulars named, so uncertain and inconclusive that no decree for its specific performance can be made.

"This determination has been arrived at irrespective of the verbal testimony which was admitted as to the meaning of the par-

ties in using the phrase in the contract 'the remaining sum of $44,000 to be secured by mortgage or mortgages on said premises bearing six per cent. per annum interest'. That testimony was admitted over objection on the ground that the phrase used in the written contract was a latent ambiguity such as might be explained by parol proof. The explanations given in the testimony of the complainant Moore, if they are to be considered, do not aid the complainants' cause as to the certainty of the agreement, for he declares that the defendant, the other party to the written contract, knew that he was to give a morgage, not for $44,000, as stated in the written contract they signed, but for some uncertain sum, to be afterwards ascertained, being such portion of the $44,000 as the complainant might be unable to place on the premises on first mortgage. In one place he testified that the mortgages were to run for as short a period as he could get them; in another, that the second mortgage to be taken from the defendant was to run for one year. In one place he says this was not put in the agreement because he did not know how much the second mortgage would be. In another place, he says he does not know why it was not put there. The written contract shows no such agreement.

"The defendant, in his parol testimony, testifies that the complainant, when they were discussing the time at which the balance of the purchase-price over the $10,000 should be paid, said, 'we will let this stay open—we will agree upon it later, on that question—so that the contract was made without time being mentioned whatever;' that no time was fixed; that the complainant said 'Might give a first mortgage, and might have to take a second mortgage.'

"The uncertainty of those terms of the agreement which are here in question, is in no way established by oral proofs.

"I have much doubt whether the written contract shows, in the clause under consideration, such an ambiguity in its meaning that parol proof ought to have been admitted. The testimony offered does not explain or make clear the supposed ambiguous phrase, but goes to show that, upon the particular term of the contract, the parties never did come to a final understanding, and left it open for subsequent conference and adjustment.

"Whether the parol proof be considered or ignored, the whole effect of the testimony goes to show that the parties have not concluded their agreement regarding the number of mortgage or mortgages to be given for the $44,000 residue of the purchase-money, or the time when it or they were to be payable, or the party to whom they were to be made, or, indeed, upon any of the several matters above discussed which would have to be determined definitely before the specific performance of the agreement would be decreed. The complainants must seek their remedy at law.

"I will advise a decree that the complainants' bill be dismissed, with costs."

So in Binns v. Smith, 93 N. J. Eq. 33, 36, this court said:

"But, notwithstanding the views already expressed, it seems clear that no decree can be awarded to complainant in this case, for the reason that no time is specified in the contract for the payment of the purchase-money mortgage which the contract contemplates that complainant shall give to defendants for a part of the purchase price. The situation presented is the same as that presented in Moore v. Galupo, 65 N. J. Eq. 194. To be enforced by decree of this court the contract must be complete in all its material parts; with any material part unexpress-

ed or left open for subsequent negotiation and determination by the parties there can be no decree. The terms of the contract now sought to be enforced clearly disclose that the purchase-money mortgage was to be an extension of credit to the purchaser; the contemplated installment payments fully disclose that the time of payment was to be postponed. In such circumstances it has been held to be the privilege of complainant to waive the credit and tender cash or a mortgage payable on demand. But the pleadings herein do not present any issue on that question. On the authority of Moore v. Galupo, supra, a decree for performance must be denied and the parties left to their legal remedies."

To the same effect, see Gould v. Hurley, 75 N. J. Eq. 512, 518.

In Kearns v. Andree, 139 Atl. (Conn.) 695 (January, 1928), the contract in question which was for the sale of real property provided, among other things, that "the defendant should assume a first mortgage of $4,500, a bank mortgage, and pay $4,000 in cash. This mortgage was not then in existence, but the plaintiff promised to obtain it; there being no agreement, however, as to the identity of the mortgage or as to its terms." The Supreme Court of Errors of Connecticut, said, beginning at page 696:

"Its (the trial court's) conclusion as to the indefiniteness of the provisions concerning the mortgage which the plaintiff was to secure is clearly sound. In Griffin v. Smith, 101 Conn. 219, 125 A. 465, we had before us an oral agreement for the sale of land, in which it was provided that the price was to be $2,850, of which $850 was to be paid in cash, and the balance secured by mortgage; and we there said:

'The defendants claim that the parol contract * * * is too indefinite to be enforced, in that the contract did not provide when the $2,000 to be left on mortgage was to become due. This claim we sustain.'

"In Platt v. Stonington Savings Bank, 46 Conn. 476, we had before us an agreement between a savings bank, which was foreclosing a mortgage upon certain premises and a second mortgagee that, on failure of redemption, the bank would convey the land to him, and that he would pay the accrued interest on the debt, and secure the principal by a mortgage upon the real estate conveyed, without any specification of the length of time the mortgage was to run; and we said:

'How long is it to remain? No time is mentioned. How shall the court decree as to the time the loan should remain when the contract is silent on the subject? The court can make no contract for the parties; they must stand or fall upon the contract they have made, and this contract is clearly void for uncertainty in this particular.' "

In Tharp etc. School v. Komus, etc. Co., 167 S. W. (Ky.) 136 (1914), a contract for the exchange of lands specific performance of which was sought contained a clause providing that $3750 was to be paid "in second lien on said property." The Court of Appeals of Kentucky in affirming a decree for the defendant said, at page 137:

"The amount of the first lien is not stated; nor is there any time fixed for the maturity of the second lien.

"In 36 Cyc. 597 (Treatise on Specific Performance by Pomeroy) it is said:

'Where payment, by the terms of the contract, is to be deferred, especially where said

deferred payment is to be secured by mortgage, but the time of payment is not specified the uncertainty is fatal.'

"In Elliott on Contracts, sec. 2292, the rule is said to be:

'So, also, it is held * * * that a contract for the sale of realty which does not show the time of payment of a mortgage to be given for a part of the purchase price, is also too indefinite to be specifically enforced.'

"In Moore v. Galupo, 65 N. J. Eq. 204, 55 Atl. 633, the contract provided for a purchase price of $54,000, of which $10,000 was to be paid in cash, the remainder to be secured by mortgage bearing 6 per cent. interest. In that case, the court held that, as the time of maturity of the mortgage was not fixed, the contract was not susceptible of specific performance, saying:

'These elements of uncertainty affect instances of the contract which are of the essence of its obligation. This appears at once when it is attempted to formulate a decree for its specific performance.'

"In Buck v. Pond, 126 Wis. 382, 105 N. W. 909, it was held that a memorandum of a contract for the sale of land, which contemplated a partial cash payment on a certain day and the giving of credit for the balance of the purchase price, but failed to contain any stipulation as to the terms of the credit and the time of making the deferred payments, was so indefinite and incomplete in a material part that specific performance thereof could not be decreed. The weight of authority is to this effect, and we believe properly so.

"It is elementary in the law of specific performance that the contract must be certain and complete in respect of its material

parts, and that its material terms must be expressed with such clearness as to enable the court to frame its decree in accordance with the intent of the parties. This requirement the contract sought to be enforced does not fulfill, either in respect to the amount or terms of the first lien, or in respect of the time of maturity of the second lien, and the court may not make complete for the parties a contract which they have left incomplete and uncertain in its material terms."

In Terry v. Michalak, 3 S. W. (2d) (Mo.) 701, (March, 1928) specific performance was sought of a contract to convey real property which among other terms, provided that one-half of the purchase price "shall be evidenced by notes, secured by deed of trust on said real estate, with interest on deferred payments at the rate of 6 per cent. per annum". The Supreme Court of Missouri, in affirming a judgment for the defendants, said, beginning at page 703:

"It is likewise apparent that the alleged contract is just as incomplete and indefinite respecting the dates of maturity, or times of payment, of the notes which shall evidence such deferred payments. Can a chancellor say that the notes are to mature in their order in successive months following the date of their execution, or are such notes to mature in their order in as many successive years, following the date of their execution? And is each of said notes to be drawn in the same amount, or shall the notes differ in their respective amounts? And, furthermore, what shall be the terms and conditions of the deed of trust by which payment of the said notes shall be secured? It is a general and universally established rule that a court of equity will not make a contract for the parties, and, where the parties have failed to make and enter into a contract which

is complete in all its essential terms, or where the contract made by the parties is indefinite and uncertain in any of its essential terms, a court of equity will not decree specific performance of such contract.

"In 36 Cyc. 587-590, respecting the subject of specific performance of contracts, it is said:

'The contract must be complete in all its parts; that is to say, it must contain all the material terms, and none of these terms must be left to be settled by future negotiation. It must also be certain; that is to say, each of the material terms must be expressed with sufficient clearness and definiteness to enable the court to ascertain the intent of the parties and to frame its decree in accordance with such intent. The court cannot make a contract for the parties, ex aequo et bono. * * * An action at law for breach of contract can often be maintained, although some of the terms of the contract are not established with exactness. It is otherwise where specific performance is required. The court, in order that it may frame a decree in accordance with the intent of the parties, must be clearly apprised of that intent in all essential respects. A greater degree of certainty is required than in actions at law for damages.'

"The same text-writer says, in 36 Cyc. 597:

'Where payment by the terms of the contract is to be deferred, especially where such deferred payment is to be secured by mortgage, but the time of payment is not specified, the uncertainty is fatal.'

"As is said by Mr. Pomeroy, in his standard treatise on Specific Performance of Contracts (3d Ed.) sec. 145:

'It is an elementary doctrine of the courts of equity that they will not specifically enforce any contract unless it be complete and certain.'

"And the learned author says, in section 159 of the same text:

'An uncertain contract, therefore, may perhaps embrace, in a partial manner, all the material terms, but on account of the inexact, indefinite, or obscure language in which one or more of them is stated, it fails to express the intent of the parties with sufficient clearness to enable the court of equity to enforce its provisions. The specific performance of an agreement, thus uncertain, will not be decreed. * * * A greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is to be the basis of an action at law for damages. An action at law is founded upon the mere nonperformance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of nonperformance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms; they must be exactly ascertained before their performance can be enforced.' * * *

"The applicable equitable principle is thus aptly stated by Williams, *J.*, in Henry v. Adkins (Mo. Sup. Div. 2) 194 S. W. 264, 267:

'Equity does not delight in supplanting indefinite, vague and ambiguous terms of a contract with clear and definite ones so that upon the definite terms thus produced by

forced or strained construction it may in the same breath exert its power of specific performance. On the other hand, it requires that the parties come into court and ask its aid in merely enforcing those terms which the parties themselves have made clear and definite.'

"It appears to be the consensus of judicial opinion and authority, as disclosed by the decisions of the appellate courts of other states, as well as by the aforecited decisions of our own court, that, where a contract for the sale of lands provides for deferred payments of the consideration, the times when such deferred payments are to be made, and the respective amounts of such deferred payments, are essential parts of the contract, and, if such times and amounts of payment be not definitely and certainly fixed by the contract, the contract is indefinite and incomplete, and can not be specifically enforced in equity." (Citing numerous authorities, among them Moore v. Galupo, 65 N. J. Eq. 194).

In Baldwin v. Corcoran, 7 S. W. (2d) (Mo.) 967, (July, 1928) the contract for the sale of lands specific performance of which was sought contained a provision as to the payment of part of the purchase price as follows:

"Ten Thousand ($10,000) Dollars first deed of trust, with interest at 6 per cent."

The Supreme Court of Missouri in affirming a judgment dismissing the petition said, at page 968:

"While the only reference made in the contract to the deferred payment on the purchase price is the provision for 'ten thousand ($10,000.00) dollars first deed of trust, with interest at 6 per cent.,' the plaintiff, in his petition, alleges that the contract provided

for the payment of 'the remainder by a note, payable three years after date of sale, secured by a first deed of trust on said property, drawing interest from the date of sale at the rate of 6 per cent. per annum, said interest to be evidenced by interest notes due and payable in 6, 12, 18, 24, 30, and 36 months after date, and which said interest notes were also to be secured by said first deed of trust'. And the plaintiff was permitted to testify in support of these allegations of his petition, although the defendant made timely objections to his competency as a witness, because of the insanity of the defendant, and to the competency of such testimony, because of the variance between the terms and provisions of the contract pleaded and the written contract offered in evidence. In the trial court and in his original brief in this court, the plaintiff insisted on his right to enforce this contract, as written and as supplemented by his testimony. In two separate reply briefs, he has completely abandoned this position, and shifted to the position that, inasmuch as the contract failed to specify the time of the deferred payment, it was payable on demand and enforceable as a demand obligation, thus eliminating the question of his competency as a witness as well as the question of the competency of his testimony in this connection. However, it seems perfectly clear that the plaintiff cannot succeed in this suit on any theory.

"It is apparent at once that the contract sought to be enforced is silent as to how or when the deferred payment of $10,000 on the purchase price was to be made, as to the terms of the promissory obligation or obligations to be given as evidence thereof, and as to the terms and conditions of the deed of trust to be given as security therefor. In all of these essentials, the contract is in-

complete, and it is the ancient and accepted rule that a court of equity will not make a contract for the parties, nor enforce by specific performance a contract which is indefinite, uncertain, or incomplete in any of its essential terms. 36 Cyc. 587, 597; Pomeroy's Spec. Perf. of Contracts (3d Ed.) secs. 145, 159; Mastin v. Halley, 61 Mo. 196; Lackawanna Coal & Iron Co. v. Long, 231 Mo. 605, 133 S. W. 35; Henry v. Adkins, (Mo. Sup.) 194 S. W. 264; Terry v. Michalak (Mo. Sup.) 3 S. W. (2d) 701. 'The same equity that does nothing by halves will not perform blindly. Before it acts, it must see what is contracted to be done and do that, no more or no less, or do nothing.' Lackawanna Coal & Iron Co. v. Long, supra, 231 Mo. loc. cit. 612, 133 S. W. 37."

We wish it understood, however, that we do not insist upon the application of this well settled doctrine to the extent of denying performance of the agreement to execute a mortgage altogether. Even though it be, as we think the authorities cited and quoted from establish it is, a complete equitable defense, we nevertheless wish to invoke it, as already stated, only to the extent of preventing the complainant from obtaining more than it has bargained for. Whatever may be the complainant's attitude, the defendant wishes and has at all times expressed its willingness to do equity. It has entered into an agreement to give a mortgage, and that agreement it is ready to perform; but its performance should be limited to its undertaking. We respectfully submit that Moore v. Galupo and the other cases cited and quoted from hereinabove furnish ample authority against compelling the defendant to execute a mortgage for five years, or one year, or two years, or ten years, or any other term whatever, except that implied by the language of the written lease—a mortgage

which will remain a lien upon the premises. As the cases we have just adverted to sufficiently demonstrate, this court should not compel the defendant to carry out an agreement into which it has never entered—it should not make a new agreement for the parties and then enforce that new agreement.

The theory has been suggested that where the agreement is silent as to the terms of the mortgage to be given, the mortgagor is bound to execute a mortgage according to the usual custom of mortgagees, especially large financial institutions. As we have already stated, the complainant has offered no argument or authority in support of such rule. We have not found any. We respectfully submit that there is no such rule.

As to the proposed covenants in the bond and mortgage that have been tendered to the defendant, the decisions of this court in the case of deeds—we have found none as to mortgages—are squarely against compelling the defendant to execute them; and we submit that the logic of the opinions applies equally to mortgages.

In Lounsbery v. Locander, 25 N. J. Eq. 554, it was held that in enforcing specific performance of a contract to convey lands equity will not compel the vendor to enter into any covenants for title where no defect in the title is disclosed in the absence of any stipulation that the purchaser shall have a conveyance with such covenants. The Court of Errors and Appeals, reversing the Court of Chancery, said by Justice Depue, commencing at page 558:

"The mooted question is, whether a court of equity, in executing a contract to convey, will compel the vendor to enter into any covenants for title, in the absence of a stipulation that the purchaser shall have a convey-

ance with such covenants. It will be observed by recurring to the principles hereinbefore adverted to, that this question is distinct from that of the kind of title the purchaser may require. If the circumstances show that he bargained for a complete title, he is not compelled to accept an imperfect title although the vendor offers a conveyance with the most ample covenants for title and of warranty. Is he entitled to covenants, where no defect in the title is disclosed, and where he has not bargained for such indemnity in addition to a conveyance of the land?

"Covenants for title are not a necessary part of the conveyance, but are distinct from, and collateral to, the transfer of title. A deed of bargain and sale, in legal form, will operate to effect a complete transfer of the title to the grantee. If covenants are added, they will not enlarge the estate, or pass any greater estate than is expressly conveyed by the granting part of the deed. Adams v. Ross, 1 Vroom. 505.

"It would follow, as a logical conclusion, from the fact that covenants for title are not essential to the conveyance, that, in a court of law, a deed of bargain and sale, without covenants, would be performance of a contract to convey in cases where covenants are not stipulated for. * * *

"To hold that a purchaser shall have a right to usual covenants, will involve the execution of contracts of this kind in uncertainty. What are usual covenants is a matter of doubt. Full covenants of warranty are quite as common, if not more so, than qualified covenants extending only to the acts of the grantor. And, if it be said that covenants of some kind are generally inserted in deeds of conveyance, it may also be said that it is quite as common practice to

specify in the agreement that covenants, and what covenants, shall be given. If the purchaser desires to be protected by covenants it is easy to stipulate for them, and it is better to leave the subject as a matter of contract between the parties.

"A decree for a conveyance of a deed of bargain and sale will give to the complainant all he contracted for, if the title has been ascertained to be such as was bargained for. To add thereto covenants not stipulated for, which are not necessary to effect a transfer of the estate, will give him what his agreement calls for, and something beyond.

"The Decree is more comprehensive in terms than is warranted by the agreement and should be varied in that respect. To amend it in form, a reversal is necessary."

In Sargent v. Realty Traders, 82 N. J. Eq. 331, Chief Justice Gummere, delivering the opinion of the Court of Errors and Appeals reversing a decree of the Court of Chancery said, at page 334:

"Lastly, it is contended that the decree should be reversed because it compels the appellant to execute a warranty deed, although the agreement contained no provision for such a conveyance. We think this point well taken. The respondent is entitled to a conveyance of the fee; but covenants of warranty are not necessary or appropriate for that purpose. They are distinct from, and collateral to, the transfer of the title. If they are added, they do not pass any greater estate than is expressly conveyed by the granting part of the deed. In considering a similar ground of reversal on the review of a decree for a specific performance, this court, in Lounsbery v. Locander, 25 N. J. Eq. 554, declared that under a contract

to convey equity will not compel the vendor to enter into any covenants for title where no defect in the title is disclosed, in the absence of any stipulation that the purchaser shall have a conveyance with such covenants. And this is true not only with relation to covenants for title but as to all other covenants of warranty. Stengel v. Sergeant, 74 N. J. Eq. 20, 68 Atl. 1106. As was said in the first of the cited cases, a decree for a conveyance by a deed of bargain and sale will give to the respondent all that he contracted for. To add thereto covenants not stipulated for, which are not necessary to effect a transfer of the estate, will give him what his agreement calls for, and something beyond."

To the same effect, see Randolph v. Rafferty, 92 N. J. Eq. 428, 430.

We submit, therefore, that the mortgage to be executed by the defendant should be joined in by the complainant, and should provide for the payment of the principal by the latter; or, as already suggested by the court at the hearing, that the complainant should be compelled to give adequate security to the defendant that it, the complainant, will pay off the principal of the mortgage.

If, however, for any reason whatever, the court should rule against the defendant's counter-claim, decision on the application to file which is being reserved by the court, or, what amounts to the same thing, against its defense embodying the matters contained in the proposed counter-claim, and decree performance solely on the provisions of the written lease, then still the only mortgage which the defendant should be called upon to execute should be one running for the entire remaining term of the lease, (including the renewal thereof, if the option to renew should be exercised) and joined in by the

> lessee, so as to make the mortgage a lien upon the entire fee, and not merely upon the landlord's reversion, and without covenants. Upon no theory should the defendant be called upon to execute such a mortgage as has been tendered to it."

After what we have just said, it seems almost supererogation to add that the complainant itself, by the affidavit of its president and owner, Stein, annexed to its bill of complaint—and which, as has been said, it has refused to print in the state of the case, and a motion to compel the inclusion of which in the state of the case is now pending before this court—admits, that, even before the bill of complaint was filed, the respondent's "reason for such refusal, * * * to execute the bond and mortgage so presented and tendered to it by the complainant * * * " is "that it, the defendant, (respondent) is not bound to assume the payment of the principal of said mortgage."

On page 4 of its brief, appellant seems to reproach the Vice Chancellor because, at the hearing he said that if he "should find under the terms of the contract, that the tenant was to pay this (the mortgage debt) off, I shall direct the lessor to sign a mortgage * * * but require security that this mortgage will be paid off," etc. (p. 75, ll. 10, et seq.), but that instead of doing so, he dismissed appellant's bill. We have yet to learn that a court's impressions, stated orally at the hearing, bind it to make its final decree in accordance therewith; but, aside from this, it seems too obvious to require pointing out that this statement was made by the Vice Chancellor on the assumption that the complainant was making its claims in good faith, and before, by his later examination of the pleadings and especially, the exhibits, its perfidy had been made manifest to him.

So, on the same page of its brief, appellant complains that "the decision of the Court below leaves the appellant in a most embarrassing situation", and, at page 5, that "the appellant is placed in a most distressing and inequitable position" etc. The word "inequitable" is, of course, wholly out of place; it merely begs the question. But as to the rest of this rather ungraceful lamentation, the obvious answer is that complainant has no one but itself to thank for the position in which it now finds itself. Had it been content with what it was entitled to, and refrained from "an unconscionable attempt to overreach the defendant" (p. 16, l. 40, to p. 17, l. 1) "a conscious and bald effort to defraud the defendant of a large sum of money under pressure of artful legal proceeding" (p. 17, ll. 14 to 16), it would not have needed to enter the Court of Chancery, or any other court, at all; but if it had nevertheless entered that court, and then, furthermore, refrained from "duplicity towards the court from which it seeks favors" (p. 16, ll. 38 to 40) it would have been granted relief. Its position is no worse than that of any other detected fraud-feasor who has been denied the relief to which an honest man would have been entitled.

The same comment fits appellant's statement at the bottom of page 4 of its brief that it "came into a court of equity seeking relief and, without concealment of any kind, set forth the construction of the lease as both appellant and respondent viewed it." That is precisely what it did not do. What it did was to "seek relief" and "set forth a construction of the lease" which, the Court of Chancery has found, there was "plenary proof" that it knew it was not entitled to (p. 16, l. 38).

Appellant's statement at the beginning of page 6 of its brief concerning its "complete frankness

and candor both in its bill of complaint and its testimony" of course requires no comment in addition to the foregoing.

In the second paragraph of page 4 of its brief, appellant says that it "purchased the lease relying upon the terms of that instrument which could have but one meaning as to the liability to discharge the mortgage debt, viz., that the obligation was to be discharged by the respondent landlord." If this is intended to be taken seriously, it approaches contempt of the Court of Chancery, which has not only found to the contrary, but has further found that appellant's very contention just stated was made by it in bad faith and with knowledge of its baselessness, and for this very reason, among others, denied appellant any relief.

At page 6 of its brief appellant complains that "it seems highly inequitable and unjust to charge the appellant, a bona fide purchaser for value, with notice of conversations which took place prior to the execution of the lease" etc., and it cites the case of Long v. Hartwell, 34 N. J. L. 116; and, it claims, that in investing $175,000. "it relied expressly upon the provisions of the lease that its investment would be reduced by $50,000. by obtaining the proceeds of the mortgage" and that "the obligation (of the mortgage) would be ultimately discharged, not by the tenant, but by the landlord."

This argument is untenable for at least three reasons. In the first place, the written lease is barren of any provision that the obligation is to be discharged by the landlord and not by the tenant. There is no express statement on the point whatever. So far as implication is concerned, that is to the contrary. The lease provides that "the said lessor shall permit the said lessee * * *

to raise cash"—not that the lessor is to raise cash or contribute to the cost of the building. It provides that the "mortgage to be executed by the lessor" is "to be a lien upon the said demised premises and the buildings and improvements thereon;" and "that the said bond and mortgage shall remain a lien upon the said demised premises and the improvements erected thereon"—upon the entire fee (necessarily by both landlord and tenant joining in the mortgage), not merely upon the landlord's reversion therein, and during the entire term of the lease—a feature which in itself satisfied the Court of Chancery that the tenant, and not the landlord, was to discharge the obligation of the mortgage (p. 15, ll. 29 to 39). And yet again, we have the provision of the lease authorizing the tenant, after the erection and completion of the building, to raze it (p. 90, ll. 3 to 10)—a privilege utterly incompatible with responsibility by the landlord for the payment of the mortgage thereon.

But, further, even if the provision just quoted did not appear in the lease at all, the appellant would not stand in any better position than that of the original lessee, who, admittedly, understood that the obligation to amortize and pay off the mortgage was his. As a matter of law, the assignee of a non-negotiable instrument, whether recorded or not, is not in the position of a bona fide holder for value. Mortgages are not negotiable instruments, and the laws governing the latter do not apply to the former. The assignee of a mortgage—which is what the appellant's position, in equity, amounts to—stands in no better position than that of his assignor. Reddavide v. Laskowitz, 100 N. J. Eq. 588.

> "The doctrine is rudimental that an assignee of a mortgage takes it subject to all

equities, latent or otherwise, in favor of the mortgagor against the mortgagee or his assignee".

Davis v. Piggott, 56 N. J. Eq. 634, reversed (Davis v. Cressman) 57 N. J. Eq. 619.

> "It is always easy for an assignee, before purchasing, to inquire of the mortgagor, or of those who have succeeded to his rights, whether or not its validity will be disputed. * * *
>
> "If he chooses to refrain from doing so, and to purchase, relying entirely upon the representations of his assignor, I think he has no right to ask the complainant (here, the respondent) to bear the consequences of his own folly." Vredenburgh v. Burnet, 31 N. J. Eq. 229, affirmed 34 N. J. Eq. 252.
>
> "It is the established rule, that the assignee of a bond or mortgage takes them subject to all equities between the assignor and other parties, whether these equities be latent or not. Bonds and mortgages have never been placed upon the footing of commercial paper, and purchasers deal in them at their own risk." Conover v. Van Mater, 18 N. J. Eq. 481, 484.
>
> "It is well settled that the assignee of a chose in action takes it subject to the same equity it was subject to in the hands of the original obligor or debtor. * * * There is no hardship in this rule, because the assignee may always resort to the original debtor, and ascertain from him what equities exist between him and his creditor." Losey v. Simpson, 11 N. J. Eq. 246, 253.

As was succinctly said in New Jersey Discount Co. v. Telesca, 101 N. J. Eq. 426, 427:

> "As to equities in favor of the mortgagor,

> an assignee may protect himself by obtaining a declaration of no defenses; as to others he may abide by the registry."

And in a case decided only a few months ago, Dreier v. Pomeroy, 7 N. J. Adv. Rep. 888, a suit to foreclose a mortgage by an assignee thereof, Vice Chancellor Buchanan, in sustaining pro tanto the defense of failure of consideration, said, at page 892:

> "The present complainant, of course, stands in the shoes of Mr. Rothberg (mortgagee); his rights are no greater, notwithstanding he paid full consideration for the bond and mortgage."

And, still further, even disregarding the rule of law just stated, in the present case we submit that on the facts the appellant is chargeable with actual notice of the understanding that the lessee was to amortize and pay off the mortgage. It is true that the witness Weisenfeld denied such notice (p. 81, l. 1, to p. 82, l. 12); but he is a vitally interested party. He is, as has been seen, the secretary, and the son-in-law of Stein, the president, of the appellant, which is a corporation, and to all intents and purposes he is, together with Stein, the appellant itself. Aside from its internal weakness, his evidence is flatly contradicted by that of Mr. Sewell and Mr. Reich, two reputable solicitors of this court, without any financial interest in the litigation or its outcome, each of whom explicitly testified that such notice was given (p. 50, l. 8, to p. 51, l. 24; p. 48, l. 28, to p. 49, l. 31). And to cap the climax, the appellant itself, by the affidavit of its president and owner Stein, annexed to its bill of complaint—which affidavit as has been said, it has refused to print in the state of the case, and a

motion to compel the inclusion of which affidavit in the state of the case is now pending before this court—makes the significant admission that "the *complainant* (appellant) *was entitled to raise* by mortgage loan, *the sum of* $50,000.00. in cash, and to have the premises * * * mortgaged by the defendant (respondent) to the mortgage (sic) as a lien and security for the re-payment of said loan"; and a little further in the same affidavit "That the complainant has expended a sum in excess of $175,000.00, * * * relying upon the said written lease that upon completion thereof, it could obtain and have the defendant *join* in a mortgage not to exceed $50,000.00 upon the said premises, and that unless the *complainant is enabled to obtain* the mortgage loan" etc., (italics ours). Can there be any reasonable doubt that this issue of fact should be resolved against the appellant and that the Court of Chancery, which heard and saw the witnesses, was right in so doing? (p. 15, l. 39, to p. 16, l. 2).

As for the only authority which appellant cites in support of this argument, Long v. Hartwell, 34 N. J. L. 116, that case is not even remotely in point on the proposition argued. It was an action at law by a vendee under a written agreement for the sale of lands to recover damages from the vendor for the latter's failure to convey a part of the lands sold. The Supreme Court said that there were two questions to be considered: The first, as to the authority of the vendor's agent to execute the written contract; and the second, "Was the stipulation in the executory contract that the vendor would convey two lots merged in or extinguished by the acceptance of the deed conveying only one lot?" (p. 122 of opinion). The court then said, at p. 124:

> "A written contract within the statute of frauds cannot be modified or altered by parol, so as to furnish, in its altered state, the basis of an action at law.
>
> "Whether parol evidence is admissible to prove the discharge or abandonment of such contract is a question upon which there is great conflict of authority, and as the discussion of this case can be confined within narrower limits, no opinion will be expressed on this point. The solution of this branch of the case will be reached by determining whether a substituted performance, actually and fully executed by the vendor, and accepted by the vendee, may be set up in defence at law to this suit on the written contract. It will be observed that this is not an attempt to found an action, or even strictly to base a defence upon an oral agreement engrafted on the written contract, but simply to prove in defence actual performance of the contract by way of accord and satisfaction", etc.

And all the foregoing, we repeat, is to be found in what is presented to this court as "Facts"—by an appellant complaining that the Court of Chancery has erred in holding it guilty of "duplicity towards the court from which it seeks favors."

I.

In answer to Appellant's Point I.

This point really consists of two separate propositions. The first is that the lease was prepared by the respondent and should therefore be construed against it.

Whatever may be the application in equity of the rule stated, in general, and in the case of a contract as vague and indefinite as the lease in question, in particular, it can have no application under the facts in the present case. The undisputed testimony is as has been seen, that all the parties to the lease were present in person; that the terms of the proposed lease were fully discussed between them; and that Mr. Sewell and Mr. Reich, the two attorneys present, whomever they may have represented originally, were on this occasion advising with all the parties, and acted only as draftsmen, attempting to put into writing the understanding which was arrived at between the parties themselves.

Fletcher v. Interstate Chemical Co., 94 N. J. L. 332, affirmed 95 N. J. L. 543, was a case at law. The opinion will be found at 94 N. J. L. 332, in the court below. The case concerned a written order prepared entirely by the defendant itself, and given by it to the plaintiff.

The second proposition appears to be that the Court of Chancery should have compelled the respondent to execute the bond and mortgage tendered to it, leaving for a future determination, presumably in some litigation between the mortgagee and the respondent, the question of what the re-

spondent's liability thereunder may be. This is simply astounding, and it is a little difficult to believe that the argument is made seriously; needless to say, no authority is cited in its support. Assuming for the purpose of the argument that the repsondent had actually drawn the lease itself—which, as has been seen, is contrary to the fact—then, if we understand the appellant's logic, that would bind the respondent to execute any bond and mortgage that the appellant might choose to present to it, in any form not provided expressly *against* by the terms of the lease; leaving the respondent then to litigation, after an indefinite term of years, against the mortgagee—a bona fide holder for value, and not even a party to this suit—and thereafter, finally, and as its only recourse, to seek redress for the loss it has sustained by further litigation against the present appellant—if it then still exists, and can be found, and is solvent. To state such a proposition should be to answer it.

II.

In answer to Appellant's Point II.

Appellant's sub-point 1 under this point might have some validity if, anywhere in the lease, the bond and the mortgage were mentioned separately —for instance, if it were provided that the lessee should execute a mortgage, and the lessor a bond and mortgage; but they are not. It seems too obvious to state that the draftsmen of the lease, both lawyers, used the phrase "bond and mortgage" as signifying one complete entity, as any lawyer would naturally do, just as a layman would naturally say, "mortgage" without mentioning the bond at all; and that they had, in so doing, no thought as to the liability of the parties inter sese.

As to appellant's sub-point 2, its whole argument is based upon an assumption that the mortgage is to remain a lien after the expiration of the lease. But this is not so. The language used clearly means during the term of the lease; in other words, the lessee is allowed the entire term of the lease to amortize the principal of the mortgage. As the Court of Chancery pertinently remarked in its opinion, "to whose advantage, possibly, could this provision be if not for the lessee who ultimately was to redeem the obligation? Why should the mortgage remain a lien if it was to be the lessor's duty to pay, if it chose to satisfy it before? The only reasonable explanation is as the lessee testified, that he had planned to amortize it over the period of the lease" (p. 15, ll. 33 to 39).

Appellant's sub-point 3, in view of the fact that the term of the lease was for twenty-five years, with

an option to the lessee to extend it to fifty years, seems hardly worth answering. To talk of "a gift of the building" to the landlord under such circumstances is ridiculous.

The mention of the payment of the interest, sub-point 4, does not carry the implication contended for by the appellant. It is rather to the contrary. The lease provides, as has been seen, that the *lessee* shall be *permitted* by the lessor to *raise cash* (p. 87, ll. 31 to 33), and that the mortgage shall remain a lien on the entire fee (p. 88, ll. 1 to 4). But this obviously did not settle whether the interest charge was included in the rent paid by the lessee, or was to be paid by him in addition to the rent. The provision requiring the lessee to pay the interest is clearly intended to settle that question.

As to the argument under appellant's sub-point 5, it would be weak enough if based upon facts; but it is not based upon facts. The respondent's position, shown at least as early as April 13, 1929 (p. 129, Exhibit C-18), was that it should not be obligated, under the terms of the mortgage itself, to pay the principal at all. Nothing as to a collateral agreement is, at any time up to the filing of the opinion of the Court of Chancery, mentioned or intimated by the respondent.

The idea of a collateral undertaking to be given by the lessee to the lessor was first injected into the case by the appellant itself. In the affidavit of its president and owner, Stein, annexed to its bill of complaint—and which, as has been said, it has refused to print in the state of the case, and a motion to compel the inclusion of which in the state of the case is now pending before this court—it alleges that "the defendant maintains that it is entitled to a collateral agreement by the complain-

ant, that the complainant will pay and discharge the principal of said mortgage obligation."

Thereupon, in the course of the hearing, the Vice Chancellor suggested, as a compromise (still, as we have already said, assuming at that time that the appellant was making its claims in good faith) the execution of a mortgage by the lessor, but with *security* (and this is the first mention of security by anyone) to be given by the lessee to save the lessor harmless from liability on such mortgage (p. 75, l. 4, to p. 76, l. 12). To this suggestion by the court respondent acceded (p. 75, l. 27, to p. 76, l. 13). Thereafter when, as we have already pointed out, the Court of Chancery, in its opinion, suggested the amendment of the defendant's answer, (p. 17, l. 30, to p. 18, l. 13), the defendant (respondent), following such suggestion, naturally also included in such amendment the court's suggestion as to security.

And of course it is true that security is not mentioned in the lease; but that, obviously, was because the lease did not contemplate any liability on the part of the lessor to pay the principal of the mortgage, so that there was nothing to secure against. The lessor was merely to *join* in the mortgage for the lessee's benefit so that the latter might be able to pledge the entire fee as security for its loan—"permit the lessee to raise cash" (p. 87, ll. 31 to 32); so that not only would it *not* have been "reasonable to insert a provision for security in the lease," but such a provision would have been quite senseless, for, as we have just said, no liability to be secured against was contemplated. The respondent has in no respect changed its position as to its interpretation of the lease from the beginning of the controversy concerning it to this moment.

And now we refer again to—we shall not here repeat them—the mass of circumstances set forth under the preceding point of our brief, which demonstrate the reverse of this point of the appellant's argument. To use appellant's language, a fair construction of the lease leads to the irresistible conclusion that the mortgage debt was to be the lessee's, not the lessor's.

We will go further—we submit that, even without any reliance upon the testimony that the amortization of the principal by the lessee "was the scheme of the complainant when it succeeded to the lease" (p. 15, l. 39, to p. 16, l. 2) or upon the "defendant's (sic; should be complainant's) own interpretation" (p. 16, ll. 2 to 37), the lease itself and alone furnishes ample internal evidence that the liability was to be that of the lessee.

III.

In answer to Appellant's Point III.

This point is not available to the appellant. The law is to the exact contrary of what the appellant maintains.

All the cases cited and quoted from by the appellant are not in point in the present litigation. They are either cases at law or equity cases not involving specific performance.

Castelbaum v. Wolfson, 92 N. J. L. 165, was at law; and, moreover, as stated by the court in its opinion, it concerned a written contract, plain and complete upon its face, obviously falling within the well known rule in Naumberg v. Young. That the appellant should be ignorant of the distinction between law and equity on this subject seems a little difficult to believe. It is succinctly pointed out in one of the very cases cited and quoted from by the appellant under this point of its brief, Parker v. Jameson, 32 N. J. Eq. 222, 224, as follows:

> "If such bargain had been made at the time of the contract, it could not, at law, alter or change the written instrument. Nor could it have any effect in equity, except as giving a foundation to a suit to reform the instrument and correct the mistake in drawing it."

Childs v. South Jersey Amusement Co., 95 N. J. Eq. 207, concerned the foreclosure of a mortgage, in which the well settled rule is that the defendant cannot set up fraud which does not go to the extent of a complete nullification of the instrument by answer, but must resort to a counter-claim. (Graham v. Berryman, 19 N. J. Eq. 29, reversed

21 N. J. Eq. 370; Parker v. Jameson, 32 N. J. Eq. 222; Parker v. Hartt, 32 N. J. Eq. 225, affirmed ib. 844), and, furthermore, concerned a mortgage which, as stated by the court, by the express provision of the contract, was payable at the end of one year from its date; the defense sought to be set up being "that, notwithstanding the due date expressed in the instrument, it should not be payable until the expiration of two years from its making and delivery."

The rule as to fraud (and, a fortiori, mistake) in specific performance cases is, however, otherwise on this point of pleading.

> "A mistake on the part of the defendant as to a contract, would be a defense here in a suit for specific performance, although it would not affect it at law, or be ground for setting it aside in equity".
>
> Hawralty v. Warren, 18 N. J. Eq. 124, 127.

> "This mistake was in the written expression of the contract, the proofs showing that it did not set forth the intent of the parties and also what that intent was. Such a mistake may be set up as a defense in a suit for specific performance. But the utmost effect the proof of the mistake can have is to require the court to consider the contract as if the omitted words were inserted."
>
> McCormick v. Stephany, 57 N. J. Eq. 257, 262.

This, we submit, is precisely the situation in the present case.

And in the recent case of Williams v. M. E. Blatt Co., 95 N. J. Eq. 326, 332, Vice Chancellor Leam-

ing, whose opinion was adopted as that of this court, said:

> "The point is urged on behalf of complainant that defendant has not by counter-claim or otherwise sought a reformation of the contract. That is true. But by this suit complainant appeals to the equitable jurisdiction of this court for affirmative relief through the medium of its extraordinary process of injunction; and by the use of that negative process complainant seeks to effect the specific performance of the contract. A court of conscience cannot properly award relief of that nature, even in pursuance of the letter of a contract, when to do so is subversive of justice between the parties. * * * Nor can a defendant be denied the defense of mistake in a contract because he has not sought its reformation."

Parker v. Jameson, 32 N. J. Eq. 222, was also a foreclosure case, and also concerned an attempted defense of an oral agreement to defer the time of payment contrary to the due date expressly stated in the mortgage. As to the language quoted therefrom, it is possible that appellant has merely copied the extract given in the opinion from Childs v. South Jersey Amusement Co., 95 N. J. Eq. 207, without taking the trouble to consult the case itself; but there can be no question that, as applied to the present case, appellant's quotation is misleading. If the omissions are supplied, it will at once be seen that the passage from the opinion concerns a question of pleading, to which we have already cited the case hereinabove, namely, whether a parol agreement can be set up as a defense to a foreclosure bill by answer alone:

> "*No attempt has been made to reform the mortgage.* When it was put in evidence, it

> stood in its original integrity. *The defense is made on answer alone.* The question, it will be perceived, is, whether this contemporaneous parol agreement can be given effect, *under the present pleadings,* so as to alter or vary the terms of the mortgage. The law upon this subject is elementary. It is part of the alphabet of the law of evidence that, when the parties to a contract have deliberately put their engagements into writing, in such terms as to import a legal obligation, without any uncertainty as to the object or extent of their engagements, it is conclusively presumed that every part of their contract was reduced to writing; and all oral evidence therefore of what was said previously or at the time the writing was executed, must be excluded, on the ground that the parties have made the writing the only evidence of what they agreed to, and whatever is not found there must be understood to have been waived and abandoned." (Italics ours.)

See page 223 of the opinion.

We quote further, from pages 222 and 224 of the opinion:

> "This suit is founded on a mortgage made * * * for $4,000., payable one year after date, with interest. * * * The main ground upon which the enforcement of the mortgage is resisted by the defendant is, that these two papers (the mortgage and a life insurance policy issued to the defendant) were delivered contemporaneously, under a parol agreement that the defendant was not to be required to pay the mortgage according to its terms; in other words, that he was not to be required to pay at the time stipulated in the mortgage, nor in money as required by the mortgage. * * *
>
> "If such bargain had been made at the

> time of the contract, it could not, at law, alter or change the written instrument. Nor could it have any effect in equity, except as giving a foundation to a suit to reform the instrument and correct the mistake in drawing it. A mortgage cannot be reformed upon an answer to a foreclosure bill.
>
> "The rule is perfectly well settled in this court, that a defendant cannot, by simple answer, avail himself of the defense of fraud in the consideration of a mortgage, which does not go to the extent of a complete nullification of the instrument; but, to have the benefit of such a defense, he must have recourse to a cross-bill.
>
> "This case is entirely free from the least suspicion of fraud, or even mistake."

Naumberg v. Young, 44 N. J. L. 331, is, of course the well known authority concerning the parol evidence rule at law—but at law only.

Van Horn v. Van Horn, 49 N. J. Eq. 327, concerned a partnership dissolution and an accounting thereon; and the immediate question before the court was whether the express terms of an agreement between the partners whereby one was to purchase the assets at a price fixed by appraisers agreed upon by the partners could be varied by evidence of a parol agreement directly contrary thereto—an example of the enforcement in equity of a legal right, and falling clearly within the Naumberg v. Young doctrine at law. Again, the briefest examination of the part of the opinion from which the appellant has extracted its quotation is sufficient to demonstrate the inapplicability of that case to the present case. The court, beginning at page 327, said as follows:

> "It was alleged in the court below that the bedroom suits in the said inventory had been appraised as perfect and complete

suits, when, in fact they had broken mirrors; also that certain step-pads had been appraised and valued at $10.50 per dozen, when the valuation should have been set down in the inventory at $10.50 per gross.

"There is nothing in the written agreement or on the face of said inventory which shows any error or mistake in either of these respects.

"In the decree appealed from, allowance was made to Richard (defendant) for both of these claims.

"In this respect we find the decree to be erroneous. A mistake in addition, or any error apparent on the face of the writings, would, of course, be corrected, but parol evidence was inadmissible to alter or vary the written agreement, and it could not be resorted to for the purpose of showing that the contract was essentially different from that which the parties had reduced to writing.

"The written agreement is complete and must be presumed to contain the entire engagement between the parties.

"In the absence of ambiguity in the contract, oral testimony cannot be introduced to explain or change it. If, through mistake or fraud, an agreement, in writing does not express the contract which the parties intended to make, the remedy is in equity to reform it, but until it is so reformed it is unassailable by parol testimony.

"The rule is entirely settled, and is very clearly stated, in the opinion of Mr. Justice Depue, in Naumberg v. Young, 15 Vr. 331.

"The written contract provides that Richard shall take the goods at a specified price, and the parties are thereby concluded in this case."

The case of Cohen v. Cohn, 6 N. J. Adv. Rep. 270, was decided by this court so recently that we feel that we need review it only very briefly. The contract concerned was complete and definite in all its terms, and it was sought to vary it by proof of an oral agreement that, in case of the happening of a condition subsequent—a reconciliation between the vendor and his children—the contract was to be abrogated. The rule concerning such cases was concisely stated by this court at page 273 of its opinion, as follows:

> "The true distinction is this: The rule excluding parol evidence has no place in any inquiry unless the court has before it some ascertained paper beyond question binding and effective, and hence parol evidence is admissible to show conditions relating to the delivery and taking effect of the instrument, as that it shall only become effective upon certain conditions or contingencies, for this is not an oral contradiction or variation of the written instrument, but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed; but evidence is not admissible which, conceding the existence and delivery of the contract or obligation, and that it was at one time effective, seeks to nullify, modify or change the character of the obligation itself, by showing that it is to cease to be effective, or is to have an effect different from that stated therein, upon certain conditions or contingencies, for this does vary or contradict the terms of the writing. 22 C. J. 1149, and cases there cited."

Obviously, that case fell within the second class of cases mentioned by the court; and just as obviously, the present case does not.

The law on this point relating to specific performance in equity is well settled by a line of de-

cisions commencing with our earliest equity reports and extending to the present day, but none of which is noticed by the appellant.

In Miller v. Chetwood, 2 N. J. Eq. 199, Chancellor Pennington denied specific performance of a written contract to convey lands on the ground "that the complainant, at the time of negotiating the said contract, and before and at the time of executing the aforesaid agreement, represented expressly" to the defendant that the tract contained more acreage than in reality it did contain, the written agreement not stating the quantity of land to be conveyed; and said, beginning at page 206:

> "It is objected, however, that all this evidence is incompetent, and must be overruled, because, whatever might have been said it was not incorporated in the agreement, and therefore cannot be used. The agreement, it must be remembered, was drawn by the complainant himself, and is silent as to the quantity of the land. A number of cases were cited by the complainant's counsel, to show that parol evidence is inadmissible to contradict or vary a written agreement, but those cases cannot control the present question. In an action upon the covenant, the party must rely upon his agreement, and it would be dangerous to let him recover upon any representations or statements made at the time which were not embodied in the agreement. In the present case, the extraordinary aid of this court is asked by the complainant, beyond his common law remedy, and in such case the defendant may be allowed this evidence to rebut the complainant's equity. All the cases recognized this distinction, and it is founded in reason. This court, not being bound to aid the complainant unless his claim is founded in justice, will look into all the circumstances, and see whether any fraud was practiced at

the time of the sale. If representations were made at the time, though not in writing, calculated to mislead in any essential particular, the party will be left to his remedy at law. There is a difference, also, in the admissibility of the evidence in this court, whether it be offered by the complainant with a view to compel a specific performance, or by the defendant to rebut the equity of the complainant. The true rule, as it appears to me, is to be found in the case of Winch v. Winchester, 1 Vesey and Beam, 378. There the court would not receive parol evidence with a view to the defendant's having the contract performed with an abatement of the price; but it was admitted to defeat altogether the specific performance. The authorities on this subject will be found in a note to the case of Rich v. Jackson, in 4 Brown's C. C. 519. * * *

"In the case of King v. Morford, Saxton. 281, Chancellor Vroom says, 'the strict rule is this, that the party who comes into equity for a specific performance, must come with perfect propriety of conduct, otherwise he will be left to his remedy at law'. This rule may be considered too strict; but I do think, with Lord Redesdale, 2 Sch. and Lef. 554, that considerable caution should be used in decreeing the specific performance of agreements, and that the court is bound to see that it really does the complete justice which it aims at, and which is the ground of its jurisdiction. * * *

"The general principles which I extract from the cases, are, that on a bill for specific performance, the court will grant its aid or not, according to the justice of the case; and that it will never interfere where the party has practiced any fraud, or been guilty of misrepresentation in any material particular".

In Hall v. Ely, 91 N. J. Eq. 92, the question before the court was the deduction, if any, to be allowed to the defendant-vendee in decreeing specific performance, the contract having called for the conveyance of two tracts and it developing that the complainant-vendor did not have a marketable title to one of these. This court, in affirming the decree of the Court of Chancery, said, by Justice Parker, at page 95:

> "The other points argued for a reversal are that it was error to admit testimony touching transactions which occurred prior to execution of the contract, because they were obnoxious to the rule excluding parol evidence tending to vary or contradict the terms of the contract * * *. As to the evidence objected to, it was clearly competent, not as varying or contradicting the contract, but to show the defendant's knowledge of facts at the time he entered into it, just as he himself would have been entitled to put in similar antecedent transactions to show, let us say, fraud of complainant. And whereas, as in this case, the vendee himself prays a conveyance of the larger tract with an allowance for the smaller, and stipulates for a reference to ascertain what deduction, 'if any,' should be made for the failure of title to the smaller, parol evidence is not only proper, but important, on the question of the figure cut by the smaller tract in the estimation of the parties; the contract itself being silent on this point."

And in Williams v. M. E. Blatt Co., 95 N. J. Eq. 326, *supra*, Vice Chancellor Leaming, whose opinion was adopted as that of this court, said, at page 334, quoting Professor Pomeroy:

> "It is therefore a well-settled rule that in suits for the specific enforcement of agree-

ments, even when written, the defendant may by means of parol evidence show that, through the mistake of both or either of the parties, the writing does not express the real agreement, or that the agreement itself was entered into through a mistake as to its subject-matter or as to its terms."

IV.

In answer to Appellant's Point IV.

Appellant's first statement under this point, that "the Vice Chancellor had determined all the equities * * * in favor of the appellant * * * even to the extent of intimating at the hearing that the execution of the bond and mortgage would be ordered upon the applicant's (sic) giving security for its payment" is palpably untrue. In fact, it flatly contradicts appellant's own statement, at page 4 of its brief, that "the learned Vice Chancellor reserved decision, stating among other things, that if he found the liability was ultimately the *tenants*, he would direct the respondent to execute the bond and mortgage and the appellant to give security", etc. (Italics ours). In point of fact, the record shows that the court made no determination as to the equities at the hearing, and what intimation the court did then give was that it might agree with the respondent's contention that the liability to pay the mortgage was the tenant's; and, as we have already said, at that time the Vice Chancellor had not yet had an opportunity to examine the pleadings and exhibits which, later, demonstrated to him the appellant's fraud.

Appellant's chief contention under this point appears to be that the cases cited by the Court of

Chancery, in its opinion, on the doctrine of unclean hands are different in their facts from those in the case at bar. This may be conceded as to some of the cases cited; but the objection is hypercritical. The principles involved in the cases cited are supported by the facts therein; they are peculiarly applicable to the facts in the present case; and they are in no wise limited to the states of fact involved in any particular cases. As was said so long ago, a court of equity will never undertake to give a definition of fraud and inequitable conduct for the very reason that such limitation therof would at once lead fraud-doers to circumvent such limitations and so escape the court's power.

> "If there were a technical definition of fraud, and everything must come within the scope of its words before the law could deal with it as fraud, the very definition would give to the crafty just what they wanted; for it would tell precisely how to avoid the grasp of the law."
>
> 26 C. J. 1059, quoting Parsons on Contracts.

Taking up the cases criticized by the appellant, the first two, King v. Morford, 1 N. J. Eq. 281, and Miller v. Chetwood, 2 N. J. Eq. 199, are both specific performance cases, and are, we submit, precisely in point in the present case. This sufficiently appears, we submit, from the extract from the latter case, embodying within it an extract from the former, which we have quoted under the preceding point.

The applicability of the three remaining cases, Clickner v. Clickner, 95 N. J. Eq. 479, Newark Cleaning & Dye Works v. Gross, 6 N. J. Adv. Rep. 598, and Pfender v. Pfender, 7 N. J. Adv. Rep. 142, affirmed 105 N. J. Eq. 247, although none of them

happens to be a specific performance case, is sufficiently demonstrated by the following quotation from the opinion of Vice Chancellor Berry, which was adopted as that of this court, in the case last cited, in 7 N. J. Adv. Rep. 142, 147:

> "In Clickner v. Clickner, 95 N. J. Eq. 479, this court held that where a suitor in equity has been guilty of false or misleading testimony and conduct in the presentation and hearing of his cause, his suit will be dismissed irrespective of whether or not he might otherwise be entitled to relief. * * *
>
> "The unconscionable conduct of a suitor in a matter in which he seeks relief will prompt a court of equity to remain passive. Newark Cleaning & Dye Works v. Gross (N. J. Ch.) 140 A. 684. In Gluck v. Rynda Development Co., 99 N. J. Eq. 788, affirmed 100 N. J. Eq. 554, it was held that he who comes into equity for relief *must not only enter with clean hands but must keep them clean after his entry* and until the final determination of the issue, and this means until the final decree." (Italics ours)

There are a multitude of cases in support of these doctrines, in addition to those used by the Court of Chancery, which might be cited and quoted from; but we shall confine ourselves to a very few, all of them specific performance cases, and all in this court.

In Muller v. Weiss, 91 N. J. Eq. 321, *supra*, Justice Bergen said:

> "The remedy (of specific performance) invoked by this appeal is discretionary. It is not what must be done, but what, in view of all the circumstances, should be done; and where a contract is procured by fraud, and its enforcement would be a manifest injustice, the court will refuse its aid. Plummer

v. Kepler, 26 N. J. Eq. 481; Ten Eyck v. Manning, 52 N. J. Eq. 47".

In Williams v. M. E. Blatt Co., 95 N. J. Eq. 326, *supra*, Vice Chancellor Leaming, whose opinion was adopted as that of this court, in denying specific performance, said, at page 332:

> "The point is urged on behalf of complainant that defendant has not by counter-claim or otherwise sought a reformation of the contract. That is true. But by this suit complainant appeals to the equitable jurisdiction of this court for affirmative relief through the medium of its extraordinary process of injunction; and by the use of that negative process complainant seeks to effect the specific performance of the contract. A court of conscience cannot properly award relief of that nature, even in pursuance of the letter of a contract, when to do so is subversive of justice between the parties. It is one of the necessary inherent qualities of a decree for specific performance that it does complete justice. King v. Morford, 1 N. J. Eq. (Saxt.) 274, 282. In suits of this nature this court will grant its aid or not, according to the justice of the case. Miller v. Chetwood, 2 N. J. Eq. (1 Gr. Ch.) 199, 208. A decree for specific performance will never be made, unless substantial justice will be advanced thereby. Ely v. Perrine, 2 N. J. Eq. (1 Gr. Ch.) 396, 402. 'The court will not become an instrument of injustice; and if the case presented is such that it would be unconscientious to grant the complainant the relief he seeks, and repugnant to a just sense of right between man and man, the court will refuse its aid. * * * The defendant may be unable to prove any mistake, fraud, or accident, in reference to its execution; and yet the conduct of the complainant may have induced such a state of things in relation to the subject-matter of the agreement as would

make it not only proper, but the plain duty of the court to refuse its aid in enforcing its specific performance.' Stoutenburgh v. Tompkins, 9 N. J. Eq. (1 Stock.) 332, 335, 336. 'The remedy by specific performance is discretionary. The question in such cases is not what must the court do, but what, in view of all the circumstances of the case in judgment, should it do to further justice?' Johnson v. Somerville, 33 N. J. Eq. (6 Stew.) 152, 153. An unintentional misrepresentation of a material matter will be operative as a bar to a decree for specific performance. Wuesthoff v. Seymour, 22 N. J. Eq. (7 C. E. Gr.) 66, 69. The material inquiry is not whether a complainant intended to mislead defendant, but is, Did he mislead him? Prof. Pomeroy says: 'In maintaining the defense to a suit for specific performance, the knowledge, belief, or intent of the party making the representations is wholly immaterial, and the question is not raised. The point upon which the defense turns is the fact of the other party having been misled by a representation calculated to mislead him, and not the existence of a design to thus mislead.' Pom. Spec. Perf. sec. 217. In Baskcomb v. Beckwith, L. R. 8 Eq. Cas. 100, a map was exhibited to the purchaser which was not misleading if examined carefully, and which was not intended to mislead, but which was liable to mislead if not carefully examined, and which map did in fact mislead the purchaser; specific performance was accordingly denied. The decree denying relief does not operate upon the contract or determine it fraudulent or void; it is merely a determination that under the circumstances of the case it is not in furtherance of substantial justice to extend the extraordinary powers of the court to complainant's aid. Nor can a defendant be denied the defense of mistake in a contract be-

cause he has not sought its reformation. As to that Prof. Pomeroy, in 2 Eq. Jur. sec. 860, says: 'The equitable remedy of the specific enforcement of contracts, even when they are valid and binding at law, is not a matter of course; it is so completely governed by equitable considerations that it is sometimes, though improperly, called discretionary; it is never granted unless it is entirely in accordance with equity and good conscience. It is therefore a well-settled rule that in suits for the specific enforcement of agreements, even when written, the defendant may by means of parol evidence show that, through the mistake of both or either of the parties, the writing does not express the real agreement, or that the agreement itself was entered into through a mistake as to its subject-matter or as to its terms. In short, a court of equity will not grant its affirmative remedy to compel the defendant to perform a contract which he did not intend to make, or which he would not have entered into had its true effect been understood. What is thus true of mistake is equally true of a defense based upon fraud or surprise. Wherever the defendant's mistake was, either intentionally or not, induced, or made probable or even possible, by the acts or omissions of the plaintiff, then, on the plainest principles of justice, such error prevents a specific enforcement of the agreement. Such co-operation by the plaintiff, however, is not at all essential. A mistake which is entirely the defendant's own, or that of his agent, and for which the plaintiff is not directly or indirectly responsible, may be proved in defense, and may defeat a specific performance.' "

In Migel v. Bachofen, 96 N. J. Eq. 608, 611, Chief Justice Gummere said:

> "The remedy by specific performance is discretionary; the question is not what must the court do, but what, in view of all the circumstances of the case in judgment, should it do to further justice, and, where the enforcement of the contract will be attended with great hardship or manifest injustice to the defendant, the court should always refuse its aid. Plummer v. Keppler, 26 N. J. Eq. 481, and cases cited; Blake v. Flatley, 44 N. J. Eq. 231."

And in Gluck v. Rynda Development Co., 99 N. J. Eq. 788, affirmed 100 N. J. Eq. 554, Vice Chancellor Berry, whose opinion was adopted as that of this court, said, beginning at page 796:

> "The complainants have sought relief in a court of equity. A court of equity is a court of conscience. The conscience of the applicant for relief in this court is always open to the scrutiny of the chancellor. One of the most wholesome and beneficent principles of a court of equity finds voice in the maxim that 'he who comes into equity must come with clean hands,' and this maxim means that, not only must one seeking equitable relief *enter* the portals of this court with clean hands, but he must *keep* them clean after his entry and until the final determination of the issue. * * *
>
> "This doctrine of clean hands is of ancient origin (Bentley v. Tibbals, 223 Fed. Rep. 247) and broad application. 21 Corp. Jur. 182.
>
> "In Deweese v. Reinhard, 165 U. S. 386 (41 Lawyers' ed. 757), Mr. Justice Brewer said:
>
> 'A court of equity acts only when and as conscience commands, and if the conduct of

the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.'

In Eaton Eq. 74, it is said:

'Equity will refuse its aid in the enforcement of a contract where the plaintiff has practiced fraud on the defendant, and also where the plaintiff has been guilty of any unconscionable conduct which does not amount to legal fraud.'

In Pom. Eq. Jur. sec. 398, it is said:

'Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days, that while the court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of the law, or even in contradiction of those rules, while it could act *upon the conscience* of a defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies. This fundamental principle is expressed in the maxim 'He who comes into

a court of equity must come with clean hands.'

And further, in sec. 404:

'It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience.'

"In Primeau v. Granfield, 193 Fed. Rep. 911, 913 (56 Lawyers' ed. 1267), the court said, in discussing the application of this maxim:

'The court must consider it, not because it is a matter of defense to the defendant, but because it is against public policy to hear the case if the charge is established. The court acts for its own protection rather than for the protection of the defendant. When fraud or illegality is disclosed in a case public policy requires a court to refuse its aid irrespective of the state of the pleadings and regardless of the fact that with fraud and illegality absent the plaintiff might appear entitled to relief.'

"In Houts v. Hellman, 228 Mo. 655, 671; 128 S. W. Rep. 1001, the court said:

'The maxim is enforced by the chancellor *ex mero motu*, and because of public policy, when the facts call it into use, though the disclosures are made at the trial as happened in this case. Sometimes it is applied where both plaintiff and defendant have knowingly made a contract tainted with illegality; sometimes it is applied where only the party seeking to enforce is in fault; but it proceeds always on the theory that the dignity of the court is touched to the quick, and that courts of equity will not countenance inequity.'

In Commonwealth v. Filiatreau, 161 Ky. 434, 170 S. W. Rep. 1182, it was held that—

'The maxim is broad enough to demand that he who prays from the chancellor protection, as well as he who seeks affirmative aid, must openly and frankly, without reservation or evasion, yield to the chancellor that full measure of confidence and truth which is prerequisite to the assertion and exercise of chancery powers, and the lack of which must necessarily repel him from a forum whose very foundation is mutual confidence and good faith.'

"In Bearin v. Dux Oil Co., 166 Pac. Rep. 199, application was made for a temporary injunction, and the complainant falsely alleged that it was in possession of the premises involved in the suit to obtain the process of the court to enable it to regain possession. The supreme court of Oklahoma, on appeal, held that the complainant had not come into equity with clean hands and was not entitled to any relief, citing among other cases, Michigan Pipe Co. v. Fremont, 111 Fed. Rep. 284, in which case Judge Sanborn said:

'A suit in equity is an appeal to the moral sense of the chancellor. A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty and reasonable diligence, will move it to action. Its decree is the exercise of discretion, not of an arbitrary and fickle will, but of a wise judicial discretion, controlled and guided by the established rules and principles of equity jurisprudence. One of the most salutary of these principles is expressed by the maxims, 'he who comes into a court of equity must come with clean hands,' and 'he who has done iniquity cannot have equity.' A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been

wanting in good faith, honesty or righteous dealing. While in a proper case it acts upon the conscience of the defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant, who has been guilty of bad faith, fraud or any unconscionable act in the transactions which forms the basis of his suit.'

"In Little v. Cunningham, 92 S. W. Rep. (Missouri Appeals) 734, * * *the court said: * * *

'One of the ancient and familiar maxims of equity jurisprudence is that 'he who comes into equity must come with clean hands.' The maxim has been otherwise stated, 'who does inequity shall not have equity.' * * * They must come with clean hands, with a conscionable regard for the rights of others, ready to do equity on their part and seeking only equity at the hands of the court. * * * And in discussing the salutary principle, it is said: 'Generally, when a party seeking the intervention of equity has been attempting to secure his ends by means resembling those which he seeks to enjoin he will be denied relief. * * * The principles of equity, identical with the principles of justice and truth as they are, are applied by a court of conscience on the status of the case and the parties as they are revealed at the time the relief is administered by decree, rather than at the date of the institution of the suit, inasmuch as by virtue of these wholesome principles arise the conditions which are imposed by the court' as the price of the decree it gives; and if unfavorable circumstances have arisen by the wrongful conduct of the parties during the pendency of the suit, the court will take such circumstances into account at the final reckoning. * * *

"The unconscionable character of the transaction between the parties need not be pleaded by the defendant. Whenever it is disclosed the court will, of its own motion, apply the maxim and it does not matter at what stage of the proof or in what order a lack of clean hands is discovered. 21 Corp. Jur. 186.

"But the authorities on the doctrine of unclean hands are not, by any means, confined to foreign jurisdictions. This principle has been repeatedly expounded and applied in this court and its exposition and application repeatedly affirmed by our Court of Errors and Appeals. Examples of its application will be found in Cutler v. Tuttle, 19 N. J. Eq. 549; Johns v. Norris, 22 N. J. Eq. 102; Watson v. Murray, 23 N. J. Eq. 257; Ellicott v. Chamberlain, 38 N. J. Eq. 604; Winans v. Graves, 43 N. J. Eq. 263; Brook v. Cooper, 50 N. J. Eq. 761; Hildebrand v. Willig, 64 N. J. Eq. 249; Vulcan Detinning Co. v. American Can Co., 70 N. J. Eq. 588; reversed, but not on principle, in 72 N. J. Eq. 387; Pendleton v. Gondolf, 85 N. J. Eq. 308, where Vice-Chancellor Leaming reviewed a number of cases (Prindeville v. Johnson, 93 N. J. Eq. 425; Neubeck v. Neubeck, 94 N. J. Eq. 167), and see the later case of Clickner v. Clickner, 95 N. J. Eq. 479, where Vice-Chancellor Buchanan denied relief to a petitioner for annulment on the ground that he had, by his testimony, been guilty of an attempt to fraudulently impose upon the court.

"Measured by the standard of these emient authorities the complainants' conduct falls far short of equitable requirements warranting the exercise of the extraordinary powers of this court in their behalf. It is baldly apparent that not only did the complainants not come into this court with clean hands, but they have not kept them unsoiled since their entry."

It seems to us that the finding of the Court of Chancery that the appellant, the complainant in that court, was guilty "not only of * * duplicity towards the court from which it seeks favors, but also of an unconscionable attempt to overreach the defendant" and of "a conscious and bald effort to defraud the defendant of a large sum of money under pressure of artful legal proceeding" and of "cunning and dishonesty" (p. 16, l. 38 to p. 17, l. 22) is so overwhelmingly supported by the evidence as to be inescapable. Perhaps the outstanding fact, to which we have already called attention in our Statement of Facts, and which, without any recourse to the testimony of the witnesses, shows up like a danger signal from a mere reading of the exhibits in their chronological order, is that at no time until January 11, 1929, when the appellant corporation ceased to act through its secretary, controlling spirit and alter ego, Weisenfeld, was there any dissension, or even discussion between the parties as to the primary liability for the proposed mortgage. Then, for the first time, the attempt was made by the appellant to shift that liability to the shoulders of the respondent; and even then, for more than a month thereafter, the fact that this effort was being made was concealed from the respondent. It was not until after respondent's solicitor, Mr. Schlittenhart, began his correspondence with and visit to the Insurance Company, that the respondent became aware of what the appellant was trying to accomplish. The sequence of events as disclosed by these exhibits is, indeed, almost ludicrously clear. Up to January 5, 1929, the appellant was trying to induce the respondent to permit its lands to be pledged for *a loan to be "raised" by the appellant* of $100,000.00 instead of the agreed maximum of $50,000.00, and was, as an

inducement to the obtaining of this concession, offering to pay $1,000.00 per year additional rent during the term of the lease.

On January 5, 1929, the appellant is definitely and finally informed by the respondent that the latter refuses the proposed amendment to the lease (p. 104, Exhibit C-9). Presumably this letter was received by Weisenfeld, the appellant's alter ego, on January 7, 1929, January 6 being a Sunday. Three days afterwards, on January 10, 1929, we find the application made to the Insurance Company in the name of the respondent on the false representation of Newman, the appellant's solicitor, that he was acting for and making the application on behalf of the respondent (p. 132, Exhibit D-3). Thereafter, as the exhibits show, and the Court of Chancery has found, every effort, in and out of court, was bent toward carrying into successful execution the fraudulent scheme to mulct the respondent of $50,000. As we have already said, however, it was not until February 18, 1929 (p. 100, Exhibit D-1) at the earliest, and probably not until some time in April, 1929, that the respondent learned of it; certainly the true significance of the appellant's acts could hardly have been realized by the respondent before April.

The Court of Chancery in its opinion called attention particularly to the two letters of November 20 and December 26, 1928, from Weisenfeld to the respondent as demonstrating the appellant's guilty knowledge of the baselessness of the claims later made by it (p. 16, ll. 2 to 37; p. 140, Exhibit D-11; p. 139, Exhibit D-9). There are additional evidences thereof. Under date of December 31, 1928, Weisenfeld writes to the respondent: "Are you willing to accept $1000. additional rental per annum for the privilege to increase *our* mortgage

to $100,000." (Italics ours) (p. 103, Exhibit C-8). Could anything be plainer?

And to cap the climax, in the letter from Newman, on behalf of the appellant, to Mr. Schlittenhart, the respondent's solicitor, written on February 16, 1929, after the fraudulent scheme had already been under way for more than a month, we find this language: "This is the matter about which Mr. Newman spoke to you some time ago relative to the company which you represent *joining* in the mortgage to the Mutual Benefit Life Insurance Co." (Italics ours) (p. 107, Exhibit C-12). Comment would be superfluous.

As against this absolutely damning evidence, all that the appellant seems to have to offer is, on page 22 of its brief, that "the increased rental ($1,000.00 per year) totalling $50,000.00 would exactly equal the increased amount of the mortgage of $50,000." Passing by entirely the fact that the lease ran for only twenty-five years, the privilege to renew it for an additional twenty-five years being at the option of the lessee, this argument rests upon this proposition: That one business man seriously and repeatedly urges upon another business man as "a worthy proposition for him to consider" (p. 141, ll. 19 to 20) a proposal to advance $50,000.00, said money to be repaid in annual installments of $1,000.00 over a term of fifty years, without security and without interest. To add any comment would indeed be to gild refined gold and to paint the lily.

To sum up on this phase of the case, we may properly quote the opening words of our brief filed in the Court of Chancery:

> "The most striking feature of this case is that the complainant, coming into a court of equity seeking a purely equitable remedy,

> one entirely in the discretion of the court, comes into court with soiled fingers. It does not attempt to deny, what is amply established by the proofs, that its solicitor, Newman, falsely represented, to the Mutual Benefit Life Insurance Company that he was attorney for the defendant, and, without the defendant's knowledge, made an application to that insurance company for a loan, purporting, falsely, to be on behalf of the defendant, signing such written application with the defendant's name and with his own name as its attorney.
>
> Next, as has just been stated, the records of this court in this case show that the complainant, acting by the same attorney, filed a bill of complaint crammed with charges of fraud against the defendant, but, at the hearing, only a few days later, did not produce one scintilla of evidence in support of any of such charges. And, third, the records of this court further show that the complainant, through its same solicitor, filed, with its said bill of complaint, an affidavit, made by its president, in support of these charges of fraud, consisting almost entirely of hearsay, and containing not one single allegation of fact, and on that affidavit obtained against the defendant a restraining order which, obviously, would never have been granted on an ordinary bill for specific performance, which is all that this bill, stripped of its gratuitous allegations of fraud, amounts to."

To this we need only add that the appellant, by refusing, over the respondent's protests, to include in the state of the case the papers forming part of the record in the Court of Chancery which clinch the proof of its "duplicity towards the court (of Chancery)", and further by the mis-statements of fact in its so-called statement of facts to which we have hereinbefore called this court's attention,

seems desirous of making absolutely sure that if this court should have any doubt as to the correctness of the conclusions of the Court of Chancery, that doubt should be removed.

Conclusion.

Finally, we wish to call the attention of this court to the fact that this respondent has at no time refused or endeavored to escape the execution of such a mortgage as the appellant actually would have been entitled to have executed by the respondent under the terms of their agreement. We again take the liberty of quoting from our brief filed in the Court of Chancery.

In that brief, immediately following the passage which we have already quoted verbatim just hereinabove, calling attention to the fraudulent conduct of the appellant, complainant in that court, both before and after its entry into the court, we said this:

> "We do not wish by the foregoing to be understood as arguing that the complainant has, by its conduct, made itself an outlaw, and forfeited all its right to relief to which it might otherwise have been entitled; but we do submit that such behavior should cause this court to scrutinize most carefully the complainant's testimony and claims, and to give added weight to our contention that the defendant has at all times been ready and willing to fulfill on its part all the obligations of the lease into which it entered, including the giving of such a mortgage as it actually undertook to give; but that the whole controversy between the parties, and the present litigation by the complainant, has arisen through the latter's determination and insistence upon getting more than it was or is entitled to."

And the conclusion of our brief in the Court of Chancery was as follows:

> "It is respectfully submitted that the prayer of the complainant's bill should be denied, and the bill dismissed with costs and a counsel fee to the defendant; and that the defendant should be decreed to do what it has at all times offered and still offers to do, namely, to perform the agreement into which it has actually entered according to the true meaning and intent thereof; and that, to this end, the court should, by its decree, fix and specify the terms of the mortgage to be executed, in accordance with the contentions heretofore made in this brief."

The Court of Chancery therefore, it will be perceived, went further than respondent, as defendant in that court, asked; evidently of its own motion (Gluck v. Rynda Development Company, 99 N. J. Eq. 788, affirmed 100 N. J. Eq. 554, *supra*). Instead of construing the agreement and determining the terms of the mortgage to be executed by the defendant in accordance with the true intent thereof, it refused to grant the complainant any relief whatever on the ground that its conduct disentitled it thereto. In other words, the court evidently considered that there were two steps to be taken: First, to decide whether the complainant was entitled to any relief; and if it was, then second, to what relief it was entitled. Having answered the first question in the negative, it naturally declined to consider the second.

We repeat that we did not ask the Court of Chancery to do what it did do; but the court having, of its own motion, and without prompting on our part, taken the action which it has taken, we have no hesitation in saying that that action was and

is right and proper; and we respectfully submit that, under the law and on the facts, the decision of the Court of Chancery was right, and its decree was right and should be affirmed.

Respectfully submitted,

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

February, 1930, Term.

New Jersey Court of Errors and Appeals

JOURNAL PLAZA HOLDING CO., a corporation, Complainant-Appellant, vs. J. L. H. COMPANY, INC., a corporation, Defendant-Respondent.	On Appeal from the Court of Chancery.

ADDENDUM TO STATE OF CASE.

Filed by Respondent by leave of Court granted February 7, 1930.

Affidavit Annexed to Bill of Complaint.

(Filed April 22, 1929.)

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

Harry Stein, being duly sworn, on his oath, according to law, deposes and says:

I am the President of the Journal Plaza Holding Co., the complainant herein, and am authorized to make the within affidavit; that I have read the foregoing bill of complaint, and the facts therein contained are true.

That on or about September 25th, 1925, and for a long time prior thereto, the defendant was and still is the owner in fee simple of the premises

mentioned and described in the bill of complaint herein.

That on the same day, the defendant, as lessor, entered into a written agreement of lease with Matthew J. Makaus, as tenant, wherein and whereby the said defendant did demise and let unto the said Matthew J. Makaus, the premises described in paragraph 1 of the bill of complaint, consisting of a vacant plot of ground, together with the appurtenances and the sole and uninterrupted use and occupation thereof, except as in said lease provided, for a term of years expiring on September 30th, 1950, upon the terms and conditions set out in said lease, a copy of which is hereto annexed and made a part hereof, and is hereby referred to.

That by mesne assignments, the said lease was assigned unto the complainant herein, which is now the owner and holder of said lease, and in possession of the premises described therein, under and by virtue of said written indenture of lease.

That upon the premises, which consisted of vacant lands, the complainant has erected a modern, substantial, three-story stone and steel construction stores and lofts building, at a cost to the said complainant, in excess of $175,000.00, and there are now in the said building, eight retail stores on the ground floor, a restaurant on the second floor, and a billiard academy on the third floor, the roof being leased for advertising purposes.

That the provisions mentioned in paragraph 5 of the foregoing bill of complaint were contained in said lease.

That under and pursuant to the provisions in said lease referred to in paragraph 5, the complainant was entitled to raise by mortgage loan,

the sum of $50,000.00, in cash, and to have the premises described in paragraph 1 mortgaged by the defendant to the mortgage as a lien and security for the re-payment of said loan.

That pursuant to the said clauses referred to in paragraph 5, the complainant, with the knowledge and approval of the defendant, applied to the Mutual Benefit Life Insurance Company of Newark, for a mortgage loan of $50,000.00 upon the premises described in paragraph 1, and said loan of $50,000.00 was granted to the said complainant, for a period of five years from its date, with interest at 5½ per cent., payable semi-annually, and thereupon the complainant presented and tendered to the defendant for proper execution by its proper officers, a bond and mortgage for said amount, in favor of the Mutual Benefit Life Insurance Company of Newark.

That the defendant, scheming, contriving and designing to cheat and defraud the complainant out of the benefits of its lease, and with the avowed purpose and intent of compelling the complainant to abandon said premises, and its valuable leasehold, and endeavoring to re-possess itself of the premises, the value of which has greatly been enhanced by the complainant's erection of said building, has refused and still refuses to execute the bond and mortgage so presented and tendered to it by the complainant, as hereinabove set forth, stating as its only reason for such refusal, that it, the defendant, is not bound to assume the payment of the principal of said mortgage, and that altho the said bond and mortgage are in respect to amount, time, and in all other respects, satisfactory to the said defendant, yet the defendant maintains that it is entitled to a collateral agreement

by the complainant, that the complainant will pay and discharge the principal of said mortgage obligation, all of which the complainant maintains is contrary to the written lease existing between the parties.

That said refusal on the part of the defendant to execute the said bond and mortgage of $50,000.-00 is not bona fide, and is a mere pretext to embarrass the complainant by straining its credit, and to compel the complainant to abandon said premises, as the defendant knew and now knows that the said commercial building, which with its large income revenue, greatly enhances the defendant's interest in fee simple, which prior to the erection of said building was vacant land with no revenue, was built upon the strength of the provisions in said lease that upon completion, the defendant would, at the request of the complainant, execute and deliver a bond and mortgage, in the sum of $50,000.00.

That the complainant has expended a sum in excess of $175,000.00, in cash for the construction of said building, relying upon the said written lease that upon completion thereof, it could obtain and have the defendant join in a mortgage not to exceed $50,000.00 upon the said premises, and that unless the complainant is enabled to obtain the mortgage loan of $50,000.00, in order to defray some of the outstanding bills for the construction of said building, and in order to reduce its obligations to banks from which credit was obtained in order to erect said building, relying upon the terms of said written lease, the complainant will be embarrassed, and will be in danger of losing said premises, and its equity therein, and without

the intervention of this Court, the complainant will suffer irreparable injury and damage.

That the defendant, in furtherance of its design to prevent the complainant from obtaining the benefit of the provisions of said lease, referring to the execution by the defendant of the bond and mortgage in the sum of $50,000.00, has threatened to do everything in its power to harrass the complainant, and to so treat and deal with the property that a decree ordering the defendant to sign the bond and mortgage will be futile, and valueless, to the complainant.

That unless this Court intervenes and orders the defendant to specifically perform the terms and provisions of said lease, the complainant is in danger of losing its equity in said lease and the building erected upon said leasehold, in which event the complainant is fearful that without this Court's intervention, the defendant's fraudulent scheme to oust the complainant of its valuable leasehold cannot be frustrated.

That unless a Receiver is appointed by this Court to take charge of the premises mentioned and described in paragraph 1 of the foregoing bill of complaint, the defendant will carry out its threat to prevent the complainant from obtaining the benefit of the provisions in said lease, referring to the bond and mortgage of $50,000.00 to be executed by the defendant, and will encumber and convey away said premises, and will do everything in its power to defeat the rights of the complainant in and to said property, so as to render the real estate of diminished value and incapable of satisfying a decree of this Court, and that said

waste, misconduct, and neglect, will work irreparable injury to complainant.

HARRY STEIN.

Subscribed and sworn to before me,
this 19th day of April, 1929.
Saul J. Zucker,
A Master in Chancery
of New Jersey.

(Endorsements)

72/576

IN CHANCERY OF NEW JERSEY.

Between
JOURNAL PLAZA HOLDING CO., a corporation,
8680
Complainant,
and
J. L. H. COMPANY, INCORPORATED, a corporation,
Defendant.

On Bill, etc.
Bill of Complaint.

Received in Office
Apr. 22 1929
Ferd Garretson
Clerk

Filed
4-22-29
John H. Backes
V. C.

Jacob L. Newman
810 Broad St.
Newark, N. J.

Rule to Show Cause.

(Filed April 22, 1929).

Journal Plaza Holding Co., a corporation, the complainant above named, having filed its bill of complaint in the above entitled cause, supported by affidavit, and wherein, amongst other things, it prayed for an order to show cause directed to the defendant therein named to show cause why the relief prayed for in the said bill of complaint should not be granted, and a Receiver of the property mentioned and described in the bill of complaint should not be appointed, and the Court having read the bill of complaint, and the affidavit thereto annexed, and being satisfied of the sufficiency of the application, and the necessity for the making of this order, it is, on this 22 day of April, Nineteen Hundred and Twenty-nine, on motion of Jacob L. Newman, solicitor for and of counsel with the complainant,

ORDERED, that the J. L. H. Company, Incorporated, a corporation, show cause before the Chancellor of the State of New Jersey, at the Chancery Chambers, 1060 Broad St., in the City of Newark on the 30th day of April, Nineteen Hundred and Twenty-nine, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why a Receiver of the premises described in the bill of complaint should not be appointed, to take possession and control of the said premises, pending final hearing in this cause, and conserve and preserve the same for the benefit of all the parties to this litigation, with all the powers incident to his said office, pursuant to the Statutes in such case made and provided; and it is further

ORDERED, that in the meantime, and until the

further order of this Court, that J. L. H. Company, Incorporated, be and it hereby is enjoined and restrained from selling, mortgaging, disposing or leasing, or in anywise encumbering the aforesaid premises, or any part thereof; and it is further

ORDERED, that service of this order be made by delivering a copy thereof, which may be conformed as a true copy by the solicitor for the complainant, together with a copy of the bill of complaint, and affidavit filed in this cause, upon the defendant, within 4 days hereof; and it is further

ORDERED, that the defendant serve upon the solicitor for the complainant, two days before the return day hereof, copies of the affidavits which it intends to submit upon argument of the within application, and the complainant have leave to file replying affidavits at the argument.

Leave is hereby given to the defendant to move to vacate or modify this order upon two days' notice to the solicitor for the complainant.

E. R. WALKER,
C.

Respectfully advised,
JOHN H. BACKES,
V. C.

Rule to Show Cause.

(Endorsements)

72/576

IN CHANCERY OF NEW JERSEY.

8680

Between
JOURNAL PLAZA HOLDING CO., a corporation,
Complainant,
and
J. L. H. COMPANY, INCORPORATED, a corporation,
Defendant.

On Bill, etc.
Rule to Show Cause.

JACOB L. NEWMAN
810 Broad St.
Newark, N. J.

Filed
4-22-29
John H. Backes
V. C.
Received in Office
Apr 23 1929
Ferd Garretson
Clerk

Answering Affidavits.

(Filed April 30, 1929)

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

John L. Holste, of the Village of Ridgefield

Park, in the County of Bergen and State of New Jersey, Henry E. Holste, of the Town of West Orange, in the County of Essex and State of New Jersey, Louis H. Holste, of the Township of Maplewood, in the County of Essex and State of New Jersey, and Julia Holste, of said Town of West Orange, in the County of Essex and State of New Jersey, all of full age, being severally duly sworn according to law upon their respective oaths, depose and say:

1. Deponent John L. Holste is the President of J. L. H. Company, Inc., a corporation created by and existing under the laws of the State of New Jersey, having its principal office in the City of Jersey City, in the County of Hudson and State of New Jersey, the defendant in the above entitled cause, and was such President on September 25, 1925, the date of the execution of the lease mentioned and described in the bill of complaint filed in the above entitled cause and has continued so to be at all times thereafter to and including the date hereof; deponent Henry E. Holste has at all the times before mentioned been and still is Secretary of said defendant corporation; and deponent Louis H. Holste has at all the times before mentioned been and still is Treasurer of said defendant corporation. Deponents John L. Holste, Henry E. Holste and Louis H. Holste at all the times before mentioned up to January 2, 1928, were the owners of all the outstanding stock of said corporation totaling ninety shares, each of said deponents owning thirty shares. On January 2, 1928, the thirty shares owned by deponent Henry E. Holste were assigned and transferred to deponent Julia Holste, who is the wife of Henry E. Holste; and since January 2, 1928, deponents

Answering Affidavits.

John L. Holste, Louis H. Holste and Julia Holste have been and still are the owners of all the outstanding stock of said corporation. Deponents John L. Holste, Henry E. Holste and Louis H. Holste have at all the times before mentioned constituted and still constitute the entire board of directors of said defendant corporation. During all the times before mentioned the said defendant corporation has not had and has not any officers, agents, servants or employees with the exception of deponents and its attorney Henry Schlittenhart, as hereinafter mentioned.

2. It is untrue that the complainant, with the knowledge and approval of the defendant, ever applied to the Mutual Benefit Life Insurance Company of Newark for a mortgage loan of $50,000.00 upon the premises described in paragraph 1 of the bill of complaint. To the contrary deponents have not, nor has any of them, at any time known or approved of any application by the complainant to the Mutual Benefit Life Insurance Company of Newark for any mortgage loan; and whatever application may have been made by complainant to said Mutual Benefit Life Insurance Company of Newark has been made by complainant without the knowledge or approval of deponents, or any of them.

3. It is untrue that complainant ever tendered to the defendant for proper execution by its proper officers a bond and mortgage for the sum of $50,000.00 in favor of the Mutual Benefit Life Insurance Company of Newark, or in favor of any other person or persons. The only instruments which have ever been tendered to deponents, or any of them, for execution in the form of a bond and mortgage in favor of the Mutual Benefit Life

Insurance Company of Newark, or any other person or persons, are a bond and mortgage for the payment of the sum of $50,000.00 but containing many conditions, covenants and agreements none of which defendant, or deponents or any of them on its behalf, have been or are obligated or bound to execute, either by the terms and conditions of the lease hereinbefore referred to or of any other instrument. True copies of the said bond and mortgage are hereunto annexed and made a part hereof and marked Schedule A and B, respectively.

4. It is untrue that the defendant, or deponents, or any of them, ever schemed, contrived or designed to cheat or defraud the complainant out of the benefit of its lease with the purpose and intent of compelling the complainant to abandon said premises and its valuable leasehold and endeavoring to re-possess itself of the premises, or any other purpose; it is untrue that defendant, or deponents, or any of them, have ever refused or still refuse to execute any bond and mortgage as set forth in the affidavit of Harry Stein filed on behalf of complainant; and it is untrue that defendant, or deponents, or any of them, ever refused or still refuse to execute any bond and mortgage whatever, for the sole reason that the defendant is not bound to assume the payment of the principal of such mortgage or for the reason that defendant, or deponents, or any of them, maintain that defendant is entitled to a collateral agreement by the complainant that the complainant will pay and discharge the principal of said mortgage obligation; or that the refusal of defendant, or of deponents, or any of them, to execute any bond and mortgage was or is not bona fide or was or

is a pretext to embarrass the complainant by straining its credit and to compel the complainant to abandon said premises or any part thereof. It is true that defendant and these deponents on its behalf have refused to execute the bond and mortgage, copies whereof are hereunto annexed and marked Schedule A and B and were advised so to refuse by their attorney, Henry Schlittenhart, a solicitor and Master of this Court, and such refusal was for the reason that the said bond and mortgage do not comply with the terms and conditions of the lease hereinbefore mentioned and that defendant and deponents on its behalf never have been and are not obligated or bound by the terms and conditions of said lease to execute said bond and mortgage, or either of them.

5. Defendant has not, nor have deponents, or any of them ever refused to join in or execute a bond and mortgage in compliance with the terms and conditions of the lease hereinbefore mentioned and referred to; but on the contrary defendant and these deponents on its behalf have at all times been and still are and tender themselves ready, willing and able to execute a bond and mortgage in compliance with and pursuant to the terms and conditions of said lease.

6. It is untrue that defendant, or deponents, or any of them, in furtherance of any design to prevent the complainant from obtaining the benefit of the provisions of said lease referring to the execution by the defendant of a bond and mortgage in the sum of $50,000.00, or any other provision or provisions of said lease, or for any other design or purpose have threatened to do everything in its or their power to harass the complainant and to so treat and deal with the property that a

decree ordering the defendant to sign a bond and mortgage will be futile and valueless to the complainant or has or have made any threats of any nature, kind or description whatever; but to the contrary defendant and these deponents have at all times stated and represented to the complainant that it and they were and are ready and willing in all respects to comply with and execute on its and their part all and any provisions of the lease hereinbefore referred to.

7. It is untrue that defendant, or deponents, or any of them, have ever engaged in or ever contemplated any scheme fraudulent or otherwise to oust the complainant of its leasehold or any part thereof; but to the contrary defendant and deponents have been and are willing and desirous that complainant should have and enjoy all the benefits lawfully accruing and to accrue to it by reason of the existence of the said lease and have on all occasions that the matter has been discussed so stated and represented to the complainant, its officers, agents, servants and attorneys.

8. It is untrue that defendant, or deponents, or any of them, have ever made a threat or have ever had or now have any intention to prevent the complainant from obtaining the benefit of the provisions in said lease referring to the bond and mortgage of $50,000.00 to be executed by the defendant, or any other provision or provisions of said lease. It is untrue that defendant, or deponents, or any of them intend or are contemplating encumbering or conveying away said premises, or any part thereof; and it is untrue that defendant, or deponents, or any of them, intend or contemplate doing anything whatever to defeat the rights of the complainant in and to said property, or any

part thereof, so as to render the real estate of diminished value and incapable of satisfying a decree of this Court or in any other way whatever. To the contrary defendant and these deponents have at all times been willing and desirous that complainant should obtain all the benefit of the said lease and of any and all provisions thereunder; defendant and these deponents have no expectation or intention of encumbering or conveying away said premises, or any part thereof, except in case of a possible sale to a bona fide purchaser for value, but no sale of any kind and no encumbrance of any kind is contemplated or planned by deponents or any of them at the present time; and defendant and deponents have no intention or expectation of doing anything whatever to defeat the rights of the complainant in and to said property or any of them or to do anything whatever that will render said real estate of diminished value or in any wise less capable of satisfying whatever decree this Court, or any other Court of competent jurisdiction, may make in relation thereto, or in relation to the rights of the complainant.

JOHN L. HOLSTE.
HENRY E. HOLSTE.
LOUIS H. HOLSTE.
JULIA HOLSTE.

Subscribed and sworn to before me
this 26th day of April, 1929.
Howard F. Barrett,
Master in Chancery
of New Jersey.

Answering Affidavits.

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

Henry Schlittenhart, of full age being duly sworn according to law upon his oath deposes and says:

1. I am a counsellor at law of the State of New Jersey and a solicitor and Master of this Court. I am and have been since May 8, 1926, attorney for J. L. H. Company, Inc., the defendant in the above entitled cause.

2. I have never on behalf of said defendant corporation approved of any application by the complainant to the Mutual Benefit Life Insurance Company of Newark for any mortgage loan. I did not know that any application had been made by the complainant to said Mutual Benefit Life Insurance Company of Newark for a mortgage loan until after the said application had been made and granted, when I was informed thereof by one Jacob L. Newman as hereinafter mentioned. To the best of my knowledge, information and belief the said defendant never approved of any application by the complainant to the Mutual Benefit Life Insurance Company of Newark nor did said defendant have any knowledge that an application for a mortgage loan had been made to said Mutual Benefit Life Insurance Company of Newark by the complainant until after I learned thereof as hereinbefore stated and advised one of the officers of said corporation.

3. No bond and mortgage in favor of the Mutual Benefit Life Insurance Company of Newark or in favor of any other person or persons has ever been tendered to me for execution by the de-

fendant with the exception of the bond and mortgage, copies of which are annexed hereto and marked Schedule A and B, respectively.

4. To the best of my knowledge, information and belief it is untrue that the defendant ever schemed, contrived or designed to cheat or defraud the complainant out of the benefit of its lease or any part thereof with any purpose or intent whatever. I have never on behalf of said defendant and to the best of my knowledge, information and belief it has never refused or still refuses to execute any bond and mortgage as set forth in the affidavit of Harry Stein filed on behalf of the complainant; I have never on behalf of said defendant and to the best of my knowledge, information and belief it has never refused or still refuses to execute any bond and mortgage whatever for the sole reason that the defendant is not bound to assume the payment of the principal of such mortgage, or for the reason that it maintains that it is entitled to a collateral agreement by the complainant that the complainant will pay and discharge the principal of said mortgage obligation and it is untrue that its refusal or my refusal on its behalf to execute any bond and mortgage was or is not bona fide or was or is a pretext to embarrass the complainant by straining its credit and to compel the complainant to abandon said premises or any part thereof. I have advised the defendant to refuse to execute the bond and mortgage, copies whereof are hereto annexed and marked Schedules A and B, for the reason that the said bond and mortgage do not comply with the terms and conditions of the lease hereinbefore mentioned and that defendant has never been and is not ob-

ligated and bound by the terms and conditions of said lease to execute said bond and mortgage, or either of them.

5. I have never on behalf of said defendant and to the best of my knowledge, information and belief it has never refused to join in or execute a bond and mortgage in compliance with the terms and conditions of the lease hereinbefore mentioned; but on the contrary defendant has at all times been, and I have stated that it has been, and still is ready and willing to execute a bond and mortgage in compliance with and pursuant to the terms and conditions of said lease.

6. I have never on behalf of said defendant and to the best of my knowledge, information and belief it has never, in furtherance of any design to prevent the complainant from obtaining the benefit of the provisions of said lease, referring to the execution by the defendant of a bond and mortgage in the sum of $50,000.00, or any other provision or provisions of said lease, or for any other design or purpose threatened to do anything to harass the complainant and to so treat and deal with the property that a decree ordering the defendant to sign a bond and mortgage will be futile and valueless to the complainant, nor made any threats of any nature, kind or description whatever; but to the contrary at all times I have on defendants behalf and it has at all times stated and represented to the complainant that it was and is ready and willing in all respects to comply with and execute on its part all and any provisions of the lease hereinbefore referred to.

7. To the best of my knowledge, information

and belief the defendant has never engaged in or ever contemplated any scheme fraudulent or otherwise to oust the complainant of its leasehold, or any part thereof; but to the contrary defendant has always been and still is and I have always on behalf of the defendant stated that it has been and still is willing and desirous that complainant should have and enjoy all the benefits lawfully accruing and to accrue to it by reason of the existence of the said lease and have on defendant's behalf on all occasions that the matter has been discussed so stated and represented to the complainant, its officers, agents, servants and attorneys.

8. I have never on defendant's behalf and to the best of my knowledge, information and belief it has never made a threat, nor has it ever had any intention to prevent the complainant from obtaining the benefit of the provisions in said lease referring to the bond and mortgage of $50,000.00 to be executed by the defendant, or any other provision or provisions of said lease. I do not on behalf of defendant and to the best of my knowledge, information and belief defendant does not intend or contemplate encumbering or conveying away said premises, or any part thereof, nor intend or contemplate doing anything whatever to defeat the rights of the complainant in and to said property or any part thereof so as to render the real estate of diminished value and incapable of satisfying a decree of this Court or in any other way whatever. To the contrary defendant has at all times been willing and desirous, and I have at all times so stated on its behalf, that complainant should obtain all the benefit of the said lease and of any and all provisions thereunder; and defend-

ant has no expectation or intention of encumbering or conveying away said premises, or any part thereof, except in case of a possible sale to a bona fide purchaser for value, but no sale of any kind and no encumbrance of any kind is contemplated or planned by defendant or by me on its behalf at the present time; and defendant has no intention or expectation of doing anything whatever to defeat the rights of the complainant in and to said property or any of them or to do anything whatever that will render said real estate of diminished value or in any wise less capable of satisfying whatever decree this Court, or any other Court of competent jurisdiction, may make in relation thereto or in relation to the rights of the complainant.

9. The first information that I, or so far as I know the defendant ever received of any application by the complainant for a mortgage loan to any amount whatever on the premises in question in this matter was on January 11, 1929, when Mr. Jacob L. Newman, a solicitor of this Court, with offices in the City of Newark, called me on the telephone and stated that a Mr. Samuel B. Weisenfeld, who is in some way connected with the complainant corporation, and who is also a solicitor of this Court, had been granted a loan of $50,000.00 by one of his (Mr. Newman's) clients and wanted to know why we objected to signing a mortgage of $100,000.00. I told Mr. Newman that I had no real final decision in the matter but that my clients did not feel that they would care to sign a mortgage for any amount larger than what they were obligated to in the lease. Mr. Newman then said that he would call me up when the mortgage trans-

action was ready in order that I could arrange to have the mortgage signed. I forthwith communicated the substance of this interview to Louis H. Holste, the Treasurer of the defendant corporation; and to the best of my knowledge, information and belief this was the first information received by said corporation of said granting of said loan.

10. On or about January 19, 1929, I received from said Jacob L. Newman a letter dated January 18, 1929, a true copy whereof is as follows:

(Follows copy of Exhibit D-5, Case, p. 136).

11. On or about February 16, 1929, the said Jacob L. Newman again called me on the telephone and requested that I furnish him with certain papers, referred to in the letter immediately hereinafter mentioned, stating that unless these papers were furnished to said Mutual Benefit Life Insurance Company of Newark it would not draw the proposed bond and mortgage for execution; and on or about February 18, 1929, I received from said Jacob L. Newman a letter dated February 16, 1929, a true copy whereof is as follows:

(Follows copy of Exhibit C-12, Case, p. 107).

Enclosed in said letter were two papers, true copies whereof are hereto annexed and marked Schedule C and D, respectively.

12. On said February 18, 1929, I sent to said Mutual Benefit Life Insurance Company of Newark by mail at its office No. 790 Broad Street, New-

ark, N. J., a letter, a true copy whereof is as follows:

(Follows copy of Exhibit D-1, Case, p. 130).

13. On or about February 20, 1929, I received from said Mutual Benefit Life Insurance Company a letter dated February 19, 1929, a true copy whereof is as follows:

(Follows copy of Exhibit D-2, Case, p. 131).

14. I forthwith communicated the substance of the aforesaid letter to the defendant having previously apprised it of my said telephone conversation with said Jacob L. Newman and his said letter of February 16, 1929, and my said client the said defendant corporation instructed me to and I accordingly did notify said Jacob L. Newman that said defendant refused to execute either of said proposed papers or to take the corporate action called for thereby unless the said proposed bond and mortgage were first submitted to me for examination by my client and myself and approved by me. The said Jacob L. Newman again said that the said Mutual Benefit Life Insurance Company would not draw the proposed bond and mortgage without having the two papers requested by them. I thereupon suggested to said Jacob L. Newman that, to help him in the matter, I was willing to go to the office of said Mutual Benefit Life Insurance Company and inspect their printed blank forms for the proposed bond and mortgage; and he thanked me for the suggestion, expressed his appreciation thereof, and urged me to do this.

15. I thereupon made an appointment with Mr.

Answering Affidavits.

Clarence Alexander of the Law Department of said Mutual Benefit Life Insurance Company, also a solicitor of this Court, which appointment, however, we were unable to keep, and after making several other efforts to comply with our respective engagements we succeeded in making an appointment for April 5, 1929, or about that date, when in accordance therewith I went to the office of said Mutual Benefit Life Insurance Company where he showed me the printed forms upon which the proposed bond and mortgage were intended to be drawn, and which were in the same form as Schedules A and B hereto annexed. I then learned for the first time from him that the proposed bond and mortgage were to contain the various conditions, covenants and agreements set forth in said Schedule A and B hereto annexed; and also learned for the first time that it was proposed to make the defendant the sole obligor and mortgagor on said bond and mortgage. I also then learned for the first time, through the exhibition of said application by said Clarence Alexander to me, that the application for said mortgage loan purported to have been made on behalf of the defendant, and was signed by said Jacob L. Newman purporting to act on behalf of J. L. H. Company, Inc., the defendant.

16. Immediately upon my return to my office, and on the same day last mentioned, I called up said Jacob L. Newman on the telephone and talked either to him or to a Mr. Zucker in his office. I told him that I had seen and learned at the office of the Mutual Benefit Life Insurance Company as hereinbefore stated; that the proposed bond and mortgage were not in accordance with my or my client's understanding of the obligations of my cli-

ent, the defendant, under the terms of the lease between it and his client, the complainant; and that I would have to consult further with my client before giving him any final decision.

17. The next thing that I heard from said Jacob L. Newman or from anyone else on behalf of the complainant was a letter from said Jacob L. Newman dated April 9, 1929, and delivered by messenger to me on the same day, a true copy whereof is as follows:

(Follows copy of Exhibit C-15, Case, p. 111).

Enclosed in said letter were three papers, true copies whereof are hereto annexed and marked Schedules E, F and G, respectively.

18. On the same day I sent in reply, by mail, a letter to said Jacob L. Newman, a true copy whereof is as follows:

(Follows copy of Exhibit C-17, Case, p. 128).

19. Between said April 9, 1929, and April 13, 1929, I accordingly conferred with my said client, the defendant, and all of its directors; and as a result of such conference they decided and authorized me to state that they would refuse to execute the proposed bond and mortgage, but that they were ready and willing to execute a bond and mortgage in accordance with the said lease. I accordingly on April 13, 1929, called said Jacob L. Newman on the telephone and told him, or someone in his office, of this decision. On the same day I sent to said Jacob L. Newman by mail a letter dated on that day, a true copy whereof is as follows:

(Follows copy of Exhibit C-18, Case, p. 129).

Answering Affidavits.

20. On April 15 or April 16, 1929, I again called said Jacob L. Newman on the telephone and spoke either to him or to someone in his office; my impression is that it was Mr. Lionel P. Kristeller. I told him that to confirm my letter of April 13, 1929, I wished to state definitely and finally that my client, the defendant corporation, refused and would positively not execute the proposed bond and mortgage, copies whereof are hereunto annexed and marked Schedules A and B.

HENRY SCHLITTENHART.

Subscribed and sworn to before me
this 27th day of April, 1929.
Ernest M. Tapner,
(Notary's Seal). Notary Public of N. J.

Schedules annexed to foregoing Affidavit.

(A, B, E, F and G—Copy of Exhibit C-16, Case, p. 113.
C and D—Copy of Exhibit C-13, Case, p. 108).

(Endorsements):

72/576

IN CHANCERY OF NEW JERSEY.

8680
JOURNAL PLAZA HOLDING CO., a corporation,
Complainant,
vs.
J. L. H. COMPANY, INC., a corporation,
Defendant.

Answering Affidavits.

On Bill, etc.
Answering Affidavits.

JOHN TRIER,
Solicitor of Defendant,
776 Broad Street,
Newark, N. J.

Service of the within Answering Affidavits is hereby acknowledged this 27th day of April, 1929.

Jacob L. Newman
Solicitor of Complainant

Filed
Apr 30 1929
John H. Backes
V. C.

Received in Office
May 2 1929
Ferd Garretson
Clerk

Notice of Motion to Vacate Rule to Show Cause and Restraining Order.

(Filed April 30, 1929).

To: JACOB L. NEWMAN, Solicitor of the complainant, Journal Plaza Holding Co.:

Please Take Notice that on Tuesday, the thirtieth day of April, 1929, at the hour of ten o'clock in the forenoon, Day light saving time, being nine o'clock Standard time, or as soon thereafter as counsel can be heard, at the Chancery Chambers in the City of Newark, I shall apply to the Chancellor for an order vacating the rule to show cause

Notice of Motion to Vacate Rule to Show Cause and Restraining Order.

and restraining order made in the above entitled cause on April 22, 1929; and that upon said application I shall use the answering affidavits filed by me in answer to the affidavits on said rule to show cause, copies whereof are served upon you herewith.

JOHN TRIER,
Solicitor of Defendant,
J. L. H. Company, Inc.

(Endorsements):

72/576 8680

IN CHANCERY OF NEW JERSEY.

JOURNAL PLAZA HOLDING CO., a corporation,
Complainant,
vs.
J. L. H. COMPANY, INC., a corporation,
Defendant.

On Bill, etc.

Notice of Motion to Vacate Rule to Show Cause and Restraining Order.

JOHN TRIER,
Solicitor of Defendant,
776 Broad Street,
Newark, N. J.

Notice of Motion to Vacate Rule to Show Cause and Restraining Order.

Service of the within Notice of Motion is hereby acknowledged this 27th day of April, 1929.

Jacob L. Newman
Solicitor of Complainant.

Filed
Apr 30 1929
John H. Backes
V. C.

Received in Office
May 2 1929
Ferd Garretson
Clerk

Notice of Objections to State of Case.

(Filed January 14, 1930).

To the Appellant Journal Plaza Holding Co.:

Take Notice that the respondent, J. L. H. Company, Inc., in the above stated cause, objects to the state of case served upon it by you for the following reasons:

1. The affidavit of Harry Stein, annexed to the bill of complaint filed by the appellant as complainant in the Court of Chancery, executed on April 19, 1929, and which is material to the questions involved in this appeal, has been omitted.

2. The rule to show cause, made by the Court of Chancery on April 22, 1929, and filed in this cause in said court, and which is material to the questions involved in this appeal, has been omitted.

Notice of Objections to State of Case.

3. The answering affidavits of John L. Holste, Henry E. Holste, Louis H. Holste and Julia Holste, executed April 26, 1929, and of Henry Schlittenhart, executed April 27, 1929, all of which were filed on behalf of this respondent as defendant in this cause in the Court of Chancery, and which are material to the questions involved in this appeal, have been omitted. This respondent does not insist upon said answering affidavits being printed in full in said state of case, but is willing that instead of their being printed in full, there appear in said state of case a notation that such affidavits were duly filed in said Court of Chancery.

4. The notice of motion by this respondent as defendant in the Court of Chancery to vacate the rule to show cause and restraining order hereinbefore referred to, made in this cause by said court, and filed therein, proof of service of which notice on appellant as complainant in said cause in said court has also been duly filed in said court, and which is material to the questions involved in this appeal, has been omitted. This respondent does not insist upon said notice of motion being printed in full in said state of case, but is willing that instead of its being printed in full, there appear in said state of case a notation that such motion was made in said Court of Chancery.

5. The testimony of the witness Louis H. Holste, at page 64, lines 30, et seq. of the state of the case, is incorrectly given as follows:

> "I said that I couldn't give him any answer on that because, as I say, as I said before, I was alone in it and I couldn't speak for my brothers."

whereas the said testimony actually was and appears in the stenographer's minutes as follows:

> "I said that I couldn't give him any answer on that because, as I say, as I said before, I was not alone in it and I couldn't speak for my brothers."

JOHN TRIER,
Solicitor for and of Counsel with
Respondent, J. L. H. Company, Inc.

(Endorsed):

Service of the within Notice of Objections to State of Case is hereby acknowledged this 13th day of January, 1930.

JACOB L. NEWMAN,
Solicitor for and of Counsel with Appellant, Journal Plaza Holding Co.)

Notice of Motion to Correct State of Case.

(Filed January 27, 1930).

To the Appellant Journal Plaza Holding Co.:

Take Notice that on Tuesday, the fourth day of February, nineteen hundred and thirty, at the hour of eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the State House, in Trenton, I shall apply to the Court of Errors and Appeals for an order requiring you to correct the state of case served upon me by you in the above entitled cause in accordance with the objections thereto heretofore served by me upon you

on January 13, 1930, which objections are as follows:

(Follow objections to state of case as printed hereinbefore).

JOHN TRIER,
Solicitor for and of Counsel with
Respondent, J. L. H. Company, Inc.

(Endorsed:

Service of the within Notice of Motion to Correct State of Case is hereby acknowledged this 24th day of January, 1930.

JACOB L. NEWMAN,
Solicitor for and of Counsel with
Appellant, Journal Plaza Holding Co.)

Petition to Correct State of Case.

(Filed January 27, 1930.)

To the Judges of the Court of Errors and Appeals of New Jersey:

The petition of J. L. H. Company, Inc., a corporation of the State of New Jersey, having its principal office in the City of Jersey City, in the County of Hudson and State of New Jersey, respectfully shows that:

1. Petitioner is the respondent in the above entitled cause.

2. On January 4, 1930 the appellant, Journal Plaza Holding Co., served petitioner with what purported to be the state of case in this cause.

3. On January 13, 1930, and within ten days after the aforesaid service upon it, petitioner served on said appellant a notice of its objections to said state of case for the following reasons:

(Follow objections to state of case as printed hereinbefore).

4. The said appellant has wholly failed and neglected to make the said corrections in said state of case or any part thereof.

Petitioner therefore prays that this court may order said appellant to correct said state of case in the particulars aforesaid.

JOHN TRIER,
Solicitor for and of Counsel with
Respondent, J. L. H. Company, Inc.

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

John L. Holste, of the Village of Ridgefield Park, in the County of Bergen and State of New Jersey, of full age, being duly sworn according to law, upon his oath deposes and says that he is the President of J. L. H. Company, Inc., a corporation created by and existing under the laws of the State of New Jersey, having its principal office in the City of Jersey City, in the County of Hudson and State of New Jersey, the respondent in the above entitled cause and the petitioner in the foregoing petition named; that he has read the said petition and is familiar with the contents thereof; and that

the same is true to the best of his knowledge, information and belief.

JOHN L. HOLSTE.

Subscribed and sworn to this 24th
day of January, 1930, before me,
Ernest M. Tapner,
(Seal) Notary Public of N. J.

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

John Trier, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am a counsellor at law of the State of New Jersey, and am the solicitor and counsel for J. L. H. Company, Inc., the respondent in the above entitled cause and the petitioner in the foregoing petition named; I have read the foregoing petition and am familiar with the contents thereof and the matters and things therein contained are true.

2. On January 4, 1930, the solicitor of the appellant in the above entitled cause served me with what purported to be the state of case in this cause.

3. On January 13, 1930, and within ten days after the aforesaid service upon me, I served on the solicitor of said appellant a notice of objections to said state of case for the reasons set forth in the foregoing petition.

4. The said appellant has wholly failed and neglected to make the said corrections in said state of case or any part thereof, so far as I am aware.

5. I obtained, shortly after the final hearing of said cause in the Court of Chancery and before filing my brief in said court, from the court stenographer a transcript of the testimony taken upon the final hearing in said cause, and which transcript I believe to be a carbon copy of the transcript furnished by said stenographer to the court in said cause. The testimony of the witness Louis H. Holste which, at page 64, lines 30, et seq. of said state of case, is printed as follows:

> "I said that I couldn't give him any answer on that because, as I say, as I said before, I was alone in it and I couldn't speak for my brothers."

actually appears in the said transcript of said testimony obtained from said stenographer, at page 47-48 thereof, as follows:

> "I said that I couldn't give him any answer on that because, as I say, as I said before, I was not alone in it and I couldn't speak for my brothers."

I was present on behalf of the respondent, as defendant in said Court of Chancery, at said final hearing, and am satisfied that the said testimony as it appears in said stenographer's transcript is correct.

JOHN TRIER.

Subscribed and sworn to this 24th
day of January, 1930, before me,
Ernest M. Tapner,
(Seal) Notary Public of N. J.

Affidavit on Motion to Correct State of Case.

(Endorsed:

Service of the within Petition to Correct State of Case and Affidavits is hereby acknowledged this 24th day of January, 1930.

JACOB L. NEWMAN,
Solicitor for and of Counsel with
Appellant, Journal Plaza Holding Co.)

Affidavit on Motion to Correct State of Case.

(Filed February 7, 1930)

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

John Trier, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am a counsellor at law of the State of New Jersey, and am the solicitor and counsel for J. L. H. Company, Inc., the respondent in the above entitled cause; and I have acted as solicitor for said defendant since the initiating of said cause in the Court of Chancery. On January 21, 1930, on behalf of said respondent I examined the record and files of the Clerk in Chancery in said cause in said Court of Chancery and found therein, as a part thereof, an affidavit of Harry Stein annexed to the bill of complaint filed by the appellant as complainant in the Court of Chancery executed on April 19, 1929, a true copy of which affidavit is hereunto annexed and made a part hereof and marked Schedule A, and which bill of complaint and affidavit bear thereon the endorsements, a true copy whereof is hereunto annexed and made a part hereof and marked Schedule B; also a rule to show

cause made by the Court of Chancery on April 22, 1929, a true copy whereof, together with the endorsements thereon, is hereunto annexed and made a part hereof and marked Schedule C; also answering affidavits of John H. Holste, Henry E. Holste, Louis H. Holste and Julia Holste, executed April 26, 1929, and of Henry Schlittenhart, executed April 27, 1929, a true copy of which answering affidavits and of the endorsements thereon is hereunto annexed and made a part hereof and marked Schedule D; and also a notice of motion by this respondent, as defendant in the Court of Chancery, to vacate the rule to show cause and restraining order hereinbefore referred to, with proof of service thereon a true copy whereof, together with the endorsements thereon, is hereunto annexed and made a part hereof and marked Schedule E.

2. As solicitor of this respondent, as defendant in said cause in said Court of Chancery, I received and have in my possession a carbon copy of said bill of complaint and affidavit hereinbefore referred to which were served on said defendant by said complainant, as well as a copy of said order to show cause and restraining order, which were also so served on said defendant, all of which have been in my possession since sometime in the month of April, 1929. As such solicitor for said defendant, I prepared the answering affidavits and notice of motion to vacate said order to show cause and restraining order and filed the same in said Court of Chancery, also during said month of April, 1929.

JOHN TRIER.

Subscribed and sworn to this 24th
day of January, 1930, before me,
Ernest M. Tapner,
(Seal) Notary Public of N. J.

Affidavit on Motion to Correct State of Case.

Schedules annexed to foregoing Affidavit.

A—Affidavit annexed to bill of complaint, printed hereinbefore.

B—Endorsements on bill of complaint, printed hereinbefore.

C—Rule to Show Cause, printed hereinbefore.

D—Answering affidavits, printed hereinbefore.

E—Notice of Motion to Vacate Rule to Show Cause and Restraining Order, printed hereinbefore).

(Endorsed:

Service of the within Affidavit on Motion to Correct State of Case is hereby acknowledged this 24th day of January, 1930.

JACOB L. NEWMAN,
Solicitor for and of Counsel with Appellant, Journal Plaza Holding Co.)