

INDEX.

	PAGE
Notice of Appeal	1
Petition of Appeal	2
Answer to Petition of Appeal	3
Complaint	4
Schedule "A"—Annexed to Complaint.....	11
Answer and Counterclaim	16
Replication and Answer to Counterclaim	27
Final Decree	32
Opinion	201

TESTIMONY.

Conrad Muller,

Direct	34
Cross	36
Recalled, direct	141
Recalled, cross	146
Recalled, direct	196

Isador Haber,

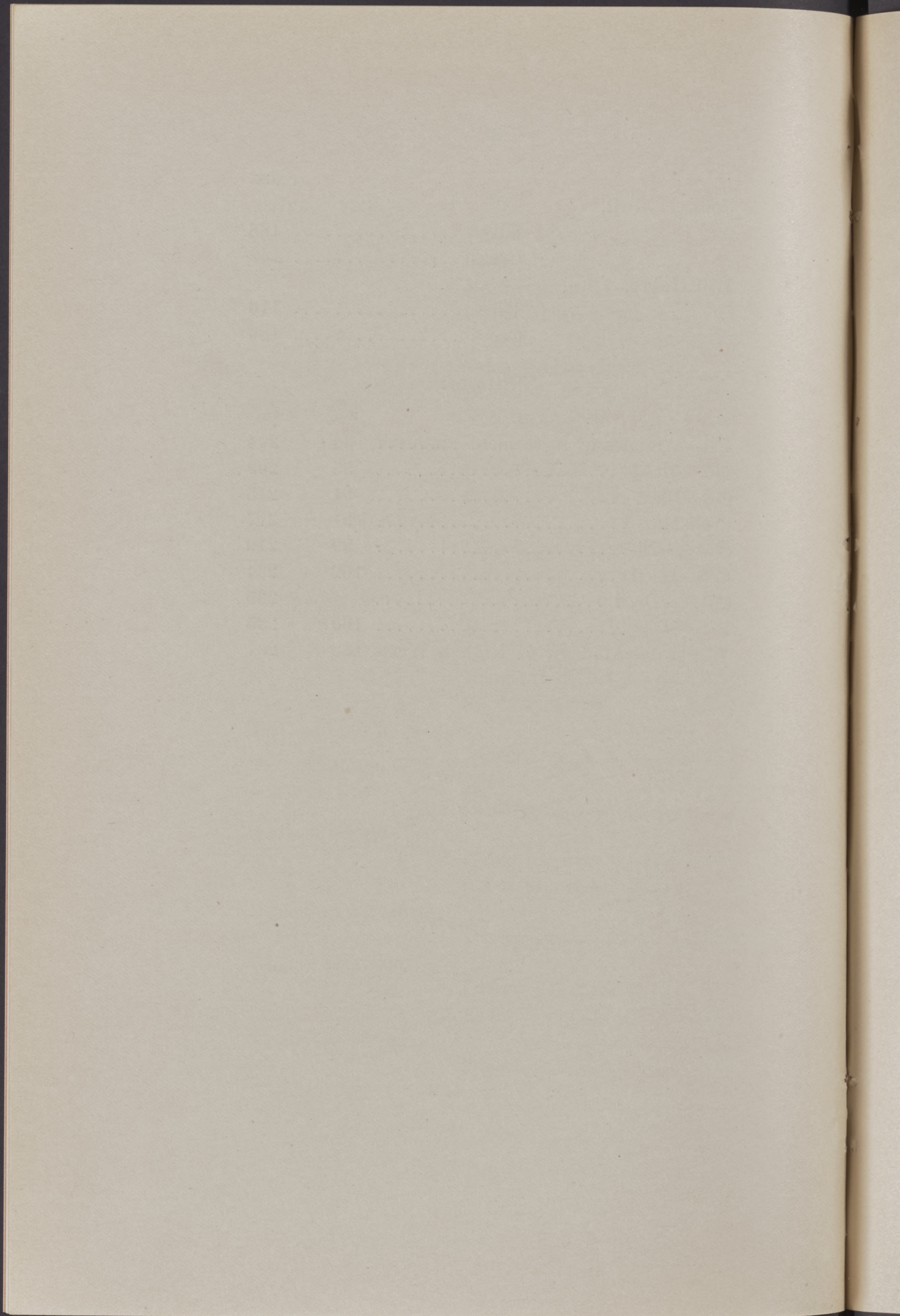
Direct	38
Cross	39
Direct	39
Cross	45
Re-direct	55
Re-cross	57
Re-direct	69
Recalled, direct	193
Recalled, cross	195

	PAGE.
Nathan Weiss,	
Direct	70
Cross	79
Resumed, cross	85
Resumed, re-direct	91
Resumed, re-cross	92
Resumed, re-direct ...	93
Recalled, cross	116
Recalled, direct	198
Henry Hope Vanderbilt,	
Direct	93
Cross	95
J. Philip Dippel,	
Direct	98
Cross	108
Joseph Davis,	
Direct	114
John G. Gerber,	
Rebuttal, direct	117
Rebuttal, cross	119
William Puck,	
Direct	119
Cross	121
Re-direct	123
Anna Muller,	
Rebuttal, direct	124
Rebuttal, cross	132
Sebastian Maulbeck,	
Direct	159
Gustav Limouze,	
Direct	160
Cross	163
Frederick Hoppe,	
Direct	167

	PAGE.
John T. Wall,	
Direct	168
Cross	169
Hill Haber,	
Direct	176
Cross	186

EXHIBITS:

	Off. Fol.	Ptd. Page
C-1—Articles of Agreement	34	204
C-2—Deed	55	209
C-3—Plan	91	215
C-4—Map	91	217
C-5—Deed	99	219
C-6—Deed	102	224
C-6-A—Deed		229
P-1—Map	160	235
Weller 1—Affidavit of Nathan Weiss	158	237



Notice of Appeal.

10

IN CHANCERY OF NEW JERSEY

Between CONRAD MULLER and ANNA MULLER, Complainants, and NATHAN WEISS and MAGGIE WEISS, Defendants.	}	On Bill, &c.	20
--	---	--------------	----

The complainants, Conrad Muller and Anna Muller, hereby appeal from the final decree and from the whole and every part thereof made in the above stated cause, to the Court of Errors and Appeals in the last resort in all causes.

30

Dated, August 18th, 1919.

WELLER & LICHTENSTEIN,
Solicitors for Complainants.

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

JOHN I. WELLER,
Of Counsel.

40

Petition of Appeal.NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	Between CONRAD MULLER and ANNA MULLER, Complainants-Appellants, and NATHAN WEISS and MAGGIE WEISS. Defendants-Appellees.	}	On Bill, etc. On Appeal.
----	---	---	-----------------------------

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

30 The petition of Conrad Muller and Anna Muller, the appellants in the above stated cause, shows that your petitioners find themselves aggrieved by the final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the 24th day of March, A. D., 1919, in a cause wherein the said Conrad Muller and Anna Muller were the complainants and Nathan Weiss and Maggie Weiss were defendants, in this respect, to wit: that said decree adjudges that the complainants' bill of complaint be and the same is hereby dismissed with costs. And your petitioners humbly appeal from said decree of the Chancellor which decrees as aforesaid, on the ground that the same is erroneous, for that as appears by the proof in said cause the contract referred to in complainants' bill should have been decreed to have been specifically performed, as

40

Answer to Petition of Appeal.

prayed for in complainants' bill, and there was no proof before the court sufficient to warrant it in decreeing in favor of the defendant.

Your petitioners therefore pray that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet. 10

And your petitioners will ever pray, etc.

WELLER & LICHTENSTEIN,
Solicitors for Appellants.

JOHN I. WELLER,
Of Counsel.

20

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between CONRAD MULLER and ANNA MULLER, Complainants-Appellants, and NATHAN WEISS, Defendant-Respondent.	}	On Appeal from Chancery	30
---	---	----------------------------	----

The answer of Nathan Weiss, the above named defendant-respondent, to the petition of appeal of the above named complainants-appellants: 40

Complaint.

This respondent (the other defendant in the Court of Chancery, Maggie Weiss, having died and any possible interest she might have had in the subject-matter of the action in Chancery, having become extinguished by her death) not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless says and admits that a final decree was on March 24, 1919, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced, and this respondent is advised and believes that the said final decree is agreeable to equity and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

McDERMOTT & ENRIGHT,
Solicitors for and of
Counsel with Respondent.

IN CHANCERY OF NEW JERSEY,
To his Honor, Edwin Robert Walker,
CHANCELLOR OF THE STATE OF NEW
JERSEY.

Humbly complaining showeth unto your Honor, your orators, CONRAD MULLER and ANNA MULLER, his wife, of the Town of West New York, in the County of Hudson and State of New Jersey:

1. That on the 23rd day of December, 1915, NATHAN WEISS and MAGGIE WEISS, his

Complaint.

wife, entered into certain article of agreement with your orators, Conrad Muller and Anna Muller, wherein and whereby the said Nathan Weiss and Maggie Weiss, therein designated as the parties of the first part, in consideration of the sum of \$45,000 agreed to sell and convey unto Conrad Muller and Anna Muller, therein designated as the parties of the second part, certain lands, tenements and hereditaments therein describe, as follows, viz.:

ALL those two certain lots, parcels or tracts of land and premises and the buildings thereon erected, situate in the Town of Union, Hudson County, N. J., and known as lot fifteen (15) in block ten (10) on "Map A of a portion of the property belonging to Cossett Land and Improvement Co. 1895," and lot fourteen (14) in block ten (10) on Map of property belonging to Clifton Park Realty Co., lying in the Town of Union and West New York, County Block No. 2445, dated March 1905, "each lot being approximately twenty-five (25) feet wide in front and rear and one hundred (100) feet deep on both sides, the former lot being conveyed to Nathan Weiss by C. S. Goldberger, Inc., by deed, dated April 21, 1915, and recorded in Liber 1202 of Deeds at pages 367, etc., and the other lot being the lot conveyed to Nathan Weiss by William Peter Brewing Company by deed, dated April 21, 1915, and recorded in Liber 1202 of Deeds at pages 369," etc., a copy of which agreement is hereto annexed and marked schedule "A."

2. In and by said agreement the said Nathan Weiss and Maggie Weiss, his wife, were to convey unto your orators, the said Conrad Muller and

Complaint.

10 Anna Muller, his wife, the lands and premises hereinabove described, subject, however, to a mortgage of \$25,000 held by the New Jersey Title Guaranty and Trust Company, a corporation of the State of New Jersey; and the said Conrad Muller and Anna Muller were to convey unto the said Nathan Weiss and Maggie Weiss the lands and premises secondly described in said agreement so made on the 23rd day of December, 1915, which are described as follows, viz.:

20 ALL those four certain lots or tracts of land and premises, situate in the Township of Weehawken, N. J., which on a "Map of property belonging to John G. Gerber, in the Township of Weehawken, Hudson County, N. J., County Block 2175" and filed on the 15th or 16th day of February, 1904, in the Hudson County Register's Office, are known and designated as lots numbered fifty-two (52), fifty-three (53), fifty-four (54) and fifty-five (55), each being approximately twenty-five (25) feet wide in front and rear and about one hundred (100) feet deep, except the corner lot, the aforesaid lots being on Park Ave., being part of the same premises conveyed to Conrad Muller and him and his wife Anna, by two deeds from John G. Gerber, et ux., one dated June 1, 1906, and recorded in Liber 940 at page 537 and deed dated April 23, 1907, and recorded in Liber 983 at pages 1069," etc., for the sum of \$15,000; subject to a mortgage of \$2,500 held by Albert Scherdecker, and to pay the said parties of the first part \$7,500 as follows, viz.: \$1,000 in cash on the delivery of the respective deeds of the parties to each other at the passing of the titles and \$6,500 by giving back a proper bond and mortgage to the parties of the first part

30

40

Complaint.

on said lands and premises so agreed to be conveyed to them with interest at the rate of six per cent. (6%) per annum, for three years, with a clause and covenant to pay off on the principal sum of \$6,500, \$200 and interest every three months, and with a privilege to pay more at the option of said parties of the second part; that by and under said articles of agreement the titles to the respective premises hereinabove described were to be delivered and exchanged on or before the 31st day of January, 1916, at ten o'clock in the forenoon at the office of Isador Haber, Esq., at No. 358 Central Avenue, Jersey City, N. J. 10

3. That on the said 31st day of January, 1916, the passing of said titles was regularly adjourned by consent of the parties to said agreement from said 31st day of January, 1916, to the 1st day of February, 1916; that on said 1st day of February, 1916, Nathan Weiss, one of the parties of the first part, and Philip Dippel of the firm of Dippel & Davis, the solicitors of said Nathan Weiss, and your orators, Conrad Muller and Anna Muller, appeared at the office of Isador Haber at No. 358 Central Avenue, in the City of Jersey City; that the said Conrad Muller and Anna Muller, parties of the second part to said agreement, were prepared to tender a full covenant warranty deed for the property secondly hereinabove described, made by the parties of the second part, Conrad Muller and Anna Muller, his wife, to the parties of the first part, Nathan Weiss and Maggie Weiss, and were also prepared to give them back on the property to be conveyed to them, a mortgage in the sum of \$6,500 bearing interest at the rate of six per cent. (6%) per annum, and to pay them \$1,- 30 40

000 according to the tenor and effect, the true intent and meaning of said agreement, but the said Nathan Weiss and Maggie Weiss refused to take title to the property secondly above described to be transferred to them and gave as a reason therefor that the deed to your orators from John G. Gerber contained restrictive covenants, although the contract so made was "subject to all restrictions of record in the chain of title" and your orators thereafter actually made the tender hereinabove set forth, but the said Nathan Weiss and Maggie Weiss refuse to accept said title of said parties of the second part to said agreement of the land herein secondly above described, although your orators procured a deed from said John G. Gerber releasing the said lands and premises from said restrictions, and although the said John G. Gerber was the only person that could be bound by them; that the said Nathan Weiss and Anna Weiss are now in possession of said lands and premises herein firstly above described and refuse to allow your orators to take possession thereof.

4. That your orators have the money and said lands herein secondly described, and hereby tender themselves ready and willing to pay the balance of said purchase price, namely, \$1,000, to deliver a deed of conveyance for the lands and premises secondly above described, which deed has already been executed, and also to execute and deliver a mortgage for \$6,500 on the lands herein firstly above-described when the same are conveyed by the defendants, Nathan Weiss and Maggie Weiss, to your orator; that the said Nathan Weiss and Maggie Weiss in equity and good conscience hold the said lands and premises firstly above described sub-

Complaint.

ject to the rights, equities and interest in said lands of your orators, and subject to the said contract of sale and to the right of your orators to have the same enforced in equity, and as trustees thereof.

5. That your orators have requested the said Nathan Weiss and Maggie Weiss to give them a deed for said lands and premises in accordance with such contract, but that the same has been refused. 10

The complainants are without adequate remedy in the courts of law, and therefore pray:

1. That Nathan Weiss and Maggie Weiss, who are the defendants to this suit, may answer this bill of complaint, without oath, and each state- 20
men therein made.

2. That an account may be taken of the rents, issues and profits of the said lands and premises since said first day of February, 1916, and that the same may be paid to the complainants.

3. That a Receiver may be appointed to receive the rents, issues and profits of the said lands and premises herein first above described. 30

4. That the said Nathan Weiss and Maggie Weiss may be ordered and decreed to convey unto your orators, Conrad Muller and Anna Muller, all of the lands and real estate herein firstly above described upon your orators executing a deed of conveyance with full covenants of warranty to the said Nathan Weiss and Maggie Weiss of the lands herein secondly above described, subject to said mortgage for \$2,500 and the restrictions contained 40

Schedule "A"—Annexed to Complaint.

in former grants of said property, and paying the sum of \$1,000 in cash, and executing a mortgage back to them on the lands and premises herein firstly above described in the sum of \$6,500 when the same shall have been conveyed to them, according to the terms and conditions of said contract.

10

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

WELLER & LICHTENSTEIN,
Solicitors for Complainants.

20

Schedule "A."

ARTICLES OF AGREEMENT

made this 23rd day of December, nineteen hundred and fifteen, BETWEEN Nathan Weiss and Maggie Weiss, husband and wife, of the Town of West New York, New Jersey, parties of the first part, and Conrad Muller and Anna Muller, husband and wife, of the same place, parties of the second part:

30

WITNESSETH, as follows: The parties of the first part, in consideration of One Dollar, paid by the parties of the second part, the receipt of which by the parties of the first part is hereby acknowledged, and also in consideration of the conveyance by the parties of the second part of the real property hereinafter mentioned, hereby agree to grant and convey to the parties of the second part, at a valuation for the purpose of this contract of Forty-

40

five thousand (\$45,000) Dollars,

Schedule "A"—Annexed to Complaint.

All those two certain lots, parcels or tracts of land and premises and the buildings thereon erected, situate in the Town of Union, Hudson County, N. J., and known as lot fifteen (15) in block ten (10) on "Map A of a portion of the property belonging to Cossett Land and Improvement Co., 1895," and lot fourteen (14) in block ten (10) on "Map of property belonging to Clifton Park Realty Co., lying in the Town of Union and West New York, County Block No. 2445, dated March, 1905," each lot being approximately twenty-five (25) feet wide in front and rear and one hundred (100) feet deep on both sides, the former lot being conveyed to Nathan Weiss by C. S. Goldberger, Inc., by deed dated April 21, 1915, and recorded in Liber 1202 of Deeds at pages 367, etc., and the other lot being the lot conveyed to Nathan Weiss by William Peter Brewing Company by deed dated April 21, 1915, and recorded in Liber 1202 of Deeds at pages 369, etc.

AND the parties of the second part, in consideration of One Dollar paid by the parties of the first part, the receipt of which by the parties of the second part is hereby acknowledged, and also in consideration of the conveyance by the parties of the first part of the real property hereinbefore mentioned, agrees to grant and convey to the parties of the first part, at a valuation for the purposes of this contract of Fifteen thousand (\$15,000.00/100) Dollars,

ALL those four certain lots or tracts of land and premises, situate in the Township of Weehawken, N. J., which on a "Map of property belonging to John G. Gerber, in the Township of Weehawken, Hudson County, N. J., County Block 2175," and filed on the 15th or 16th day of February, 1904, in the Hudson County Register's Office, are known

Schedule "A"—Annexed to Complaint.

and designated as lots numbered fifty-two (52), fifty-three (53), fifty-four (54) and fifty-five (55), each being approximately twenty-five (25) feet wide in front and rear and about one hundred (100) feet deep, except the corner lot, the aforesaid lots being on Park Ave., being part of the same premises conveyed to Conrad Muller and him and his wife Anna, by two deeds from John G. Gerber, et ux., one dated June 1, 1906, and recorded in Liber 940 at page 537, and deed dated April 23, 1907, and recorded in Liber 983 at pages 1069, etc."

10

Said premises which are to be conveyed by the parties of the first part are to be conveyed subject to the following incumbrances:

A mortgage in the sum of Twenty-five thousand (\$25,000) Dollars held by the Title Guaranty & Trust Co. All restrictions of record in the chain of title.

20

Said premises which are to be conveyed by the parties of the second part are to be conveyed subject to the following incumbrances:

A mortgage in the sum of Two thousand five hundred (\$2,500) Dollars held by Albert Scherdecker.

All restrictions and covenants of record.

The difference between the values of the respective premises over and above incumbrances shall be deemed for the purposes of this contract to be Seven thousand five hundred (\$7,500) in favor of the parties of the first part, and the said parties of the second part agree to pay the same as follows:

30

One thousand Dollars (\$1,000) in cash on the delivery of the respective deeds and the passing of title.

Six thousand five hundred (\$6,500) Dollars by giving a proper bond and mortgage to the parties of the first part with interest at six (6%) per cent.

40

Schedule "A"—Annexed to Complaint.

for three years with a clause and covenant to pay off of the principal the sum of Two hundred (\$200) Dollars and interest every three (3) months and a privilege to pay more.

The parties of the second part hereby agree to pay Hill Haber a commission of two (2%) per cent. of the sum he receives for his property at the date set for the passing of title. 10

Each of the parties to these presents hereby agrees to convey the property above described, as sold by that party, free from all incumbrances, except as above specified, and to execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered to the other party, or to the assigns of the other party, (the deed to be drawn in each case at the cost of the vendor), a property warranty deed containing full covenants, duly executed and acknowledged to convey and assure to the grantees an absolute fee of said premises. 20

Said deeds shall be delivered and exchanged on or before the 21st day of January, 1916, at 10 o'clock A. M., at the office of Isador Haber, No. 358 Central Ave., Jersey City, N. J.

Each of the parties hereto assumes the risk of loss or damages by fire prior to the completion of this contract on the premises owned by them respectively. The rents of the said premises, insurance premiums and interest on mortgage, if any, shall be adjusted, apportioned and allowed up to the day of taking title. 30

If there be water meters on the premises, the respective sellers shall furnish readings to dates not more than thirty days prior to the time herein set for closing title and the unfixed meter charges for the intervening time shall be apportioned on the basis of such last readings. 40

Schedule "A"—Annexed to Complaint.

All personal property appurtenant to or used in the operation of said premises is represented to be owned by the respective sellers and is included in this exchange.

10 This contract covers all right, title and interest of the respective sellers, of, in and to any lands lying in the bed of any street, road or avenue opened or proposed, in front of or adjoining the premises to be conveyed to the centre line thereof, or all right, title and interest of the respective sellers in and to any awards made or to be made in lieu thereof, and the sellers will execute and deliver to the purchasers, on closing of title or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of such awards.

20 AND IT IS UNDERSTOOD that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals the day and year first above written.

30 Witness
ISADOR HABER.

NATHAN WEISS (Seal)
MAGGIE WEISS (Seal)
CONRAD MULLER (L. S.)
ANNA MULLER (L. S.)

Schedule "A"—Annexed to Complaint.

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

BE IT REMEMBERED that on this 23rd day of December, in the year one thousand nine hundred and fifteen, before me, the subscriber, an attorney-at-law of New Jersey, personally appeared Nathan Weiss, Maggie Weiss, Conrad Muller and Anna Muller, who I am satisfied are the persons mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed; and the said Maggie Weiss and Anna Muller being by me privately examined, separate and apart from their said husbands, further acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, FREELY without fear, threats or compulsion of their said husbands.

ISADOR HABER,
Attorney at Law of the
State of New Jersey.

10

20

30

40

Answer and Counterclaim.

IN CHANCERY OF NEW JERSEY.

10	Between : CONRAD MULLER and ANNA MULLER, Complainants, and NATHAN WEISS and MAGGIE WEISS, Defendants.	}	On Bill, etc.
----	--	---	---------------

20 The answer of the defendants Nathan Weiss and Maggie Weiss, his wife, and the counterclaim of said defendants against the complainants Conrad Muller and Anna Muller, his wife.

These defendants Nathan Weiss and Maggie Weiss, his wife, answering the bill of complainant say that :

30 1. They admit that they signed articles of agreement bearing date December 23, 1915, of the general purport set forth in paragraph one and two of the bill of complaint and in Schedule A attached to said bill, but for certainty these defendants call on said complainants to produce and prove the original articles of agreement referred to in said bill: These defendants deny that part of paragraph two which states that the sum of \$6,500 to be paid to these defendants was to be paid by giving back a proper bond and mortgage to these defendants on said lands and premises agreed to be conveyed to the complainants, and state the fact to be that in said articles of agreement the sum of

40

\$7,500 to be paid to these defendants is provided to be paid as follows: "One thousand (\$1,000) Dollars in cash on the delivery of the respective deeds and passing of title; sixty-five hundred (\$6,500) Dollars by giving a proper bond and mortgage to the parties of the first part (these defendants) with interest at six (6%) per cent. for three years with a clause and covenant to pay off of the principal the sum of Two hundred (\$200) Dollars and interest every three (3) months and a privilege to pay more." 10

2. These defendants admit that on January 31, 1916, the passing of title referred to in paragraph three of complainants' bill was adjourned by consent to February 1, 1916, and further admit that these defendants are now in possession of the lands and premises firstly described in the bill of complaint and refuse to allow complainants to take possession thereof as alleged in said paragraph three. They admit that they refused to take title to the property secondly described in the bill of complaint because of the restricted covenants contained in the deeds made by John G. Gerber and wife to the complainant as well, as for other reasons: Aside from the matters above admitted, these defendants deny the allegations of said paragraph three. 20 30

3. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraph four of complainants' bill reciting that complainants have the money and lands therein secondly described and tender themselves ready and willing to pay the balance of the purchase price, namely: \$1,000 to deliver deed of con- 40

veyance for the lands and premises secondly described in said bill and to execute and deliver a mortgage for \$6,500 on lands firstly described in said bill and call upon complainants to make such proof thereof as they may be advised: These defendants deny the other statements and allegations of said paragraph four.

4. Paragraph five is denied.

5. These defendants further answering say that they are unable to perform the articles of agreement dated December 23, 1915, for the reason that the two lots fourteen and fifteen firstly described in said bill of complaint as one hundred feet deep are in fact only ninety-five feet deep, but these defendants state that the fact that said lots were only ninety-five feet deep was well known to the complainants; that said lots were described in the deeds which were in the hands of the scrivener when said articles were drawn as being ninety-five feet deep but through a mistake of said scrivener were described as one hundred feet.

6. These defendants further answering say that prior to the signing of said articles of agreement this defendant Nathan Weiss inquired of the complainant Conrad Muller as to the restrictions against the lands which the said Conrad Muller and his wife were to convey to these defendants and was falsely told by said Conrad Muller that there were no restrictions against said premises except that a saloon could not be conducted thereon, where as in point of fact the deed made by John G. Gerber and wife, to Conrad Muller for lots fifty-two and fifty three contains numerous re-

strictions as to the character of buildings to be placed on said premises, and the deed made by John G. Gerber to Anna Muller conveying lots fifty-four and fifty-five contains a restrictive covenant in which the grantee covenants to use said premises for dwelling and store purposes for the sale of merchandise generally, but not for manufacturing purposes, for the precise language of the covenants and restrictions in said deeds these defendants refer to the original deeds or the record thereof. 10

7. Numerous other deeds made by the said John G. Gerber and wife, the purchaser of lots on Sixth Street adjoining and near the premises agreed to be conveyed to these defendants by the complainants, contain identical or similar covenants to those contained in the deed made by the said John G. Gerber and wife to Conrad Muller above referred to. 20

8. These defendants further answering say that upon inquiry made by this defendant, Nathan Weiss, the said Conrad Muller falsely informed him that lots fifty-three, fifty-four and fifty-five, three of the lots secondly described in the bill of complaint, which were agreed to be conveyed by said complainants to these defendants were twenty-five feet wide in front and rear and one hundred feet deep, whereas in point of fact said lots were of much less depth than one hundred feet. 30

9. By reason of the premises above set forth the title to the lots agreed to be conveyed to these defendants is not marketable, and these defendants whose purpose in securing said lots was to erect a 40

large apartment house thereon are unable to employ said premises for that purpose without being subjected to litigation by reason of said restrictive covenants. These defendants would not have entered into the said contract except for the false representation made to them as to the restrictions
10 on said premises and the size of said lots.

10. These defendants submit that they should not be required to perform said agreement as written and should not be required to take title to said four lots in view of the facts hereinabove set forth, and should not be required to convey their property to the complainants, and that they should be hence dismissed with their reasonable costs and charges in this behalf most wrongfully
20 sustained.

By way of counterclaim against the complainants these defendants say that:

1. In the month of December, 1915, negotiations were opened by this defendant Nathan Weiss with the complainant Conrad Muller for the exchange of an apartment house owned by this defendant in the Town of Union, Hudson County, N. J., on lots
30 known as fourteen and fifteen referred to, but not correctly described in paragraph one of the bill of complaint for four lots located on the southerly corner of Sixth Street and Bulls Ferry Road, in the Township of Weehawken, Hudson County, N. J. Said four lots are vacant and it was the intention of these defendants on acquiring same to erect thereon a large apartment house: This purpose was well known to the complainants and during the negotiations for the exchange, the com-
40

plainant Conrad Muller exhibited to this defendant Nathan Weiss a blue print of a large apartment house, which he said he had at one time intended to build on said lots.

2. On or about December 23, 1915, this defendant Nathan Weiss met complainants and fixed the prices at which the several properties were to be considered in making the exchange: Shortly thereafter the preparation of the written articles of agreement was begun by one Isador Haber, the son of Hill Haber, the agent, to whom the complainants agreed to pay a commission in said articles of agreement. At the time these articles of agreement were being prepared, these defendants had no opportunity to inspect the deeds under which the complainants acquired the said four lots or the map of said premises, and were not familiar with the covenants or restrictions in said deeds or the actual dimensions of said four lots as laid down on said map. This defendant Nathan Weiss on learning that it was proposed to convey said four lots subject to all restrictions and covenants of record inquired of said complainant Conrad Muller what restrictions were on said property, and was told by said Muller that there were no restrictions except that a saloon could not be conducted thereon, which said statement by said Conrad Muller was false in fact and was known by him to be false and was made to this defendant Nathan Weiss to induce him to sign the said articles of agreement in which said four lots were to be conveyed subject to all restrictions and covenants of record: These defendants were at that time wholly ignorant as to the restrictions or restrictive covenants affecting said premises, and

10

20

30

40

would not have signed said agreement except for the false statements made by the said complainant Conrad Muller.

3. At or about the time of the preparation of said articles of agreement this defendant Nathan
10 Weiss, who was then ignorant as to the exact size of the said four lots inquired of the complainant Conrad Muller as to the size of said lots and was informed that the corner lot was thirty feet wide and ninety-five feet deep and the other three lots were each twenty-five feet wide and one hundred feet deep, which said statement by said complainant Conrad Muller was false in fact and was known
20 by him to be false, and was made for the purpose of inducing these defendants to sign the said articles of agreement and to take title to said four lots three of which represented by said complainant as being one hundred feet deep were in fact of much less depth than one hundred feet.

4. At or about the time when the said articles of agreement were being prepared, this defendant Nathan Weiss inquired of the said Conrad Muller what it would cost to excavate the said four lots and was told by said Muller that he had an estimate
30 of \$1500 for making such excavation. These defendants have since ascertained that the cost of excavating said lots will amount to \$4000 or thereabouts, and charge that the said complainant Conrad Muller well knew that the cost of excavation would exceed the sum of \$1500, and that he made the statement indicating that the excavation could be made for \$1500 in order to deceive these defendants, and to induce them to sign the said articles of agreement and take title to said lots.

40

Answer and Counterclaim.

5. After these defendants had been induced to sign the said articles of agreement they discovered that three of the four lots agreed to be conveyed by the complainants, namely: Lots fifty-three, fifty-four and fifty-five were of much less depth than one hundred feet; and discovered also that it would cost \$4000 or thereabouts to excavate the said lots, and further discovered on a search being made against the said four lots that in the deed made by John G. Gerber to the complainant Anna Muller conveying lots fifty-four and fifty-five the grantee covenanted that she would use said premises for dwelling and store purposes for the sale of merchandise generally, but not for manufacturing purposes, and that such covenants should run with the land until May 1, 1920. These defendants further discovered that in the deed made by John G. Gerber and wife, to Conrad Muller conveying lots numbers fifty-two, fifty-three and fifty-six, the party of the second part entered into the following covenant, to wit:

“And the said party of the second part for himself, his heirs, and assigns does hereby covenant and agree to and with the said John G. Gerber his heirs, executors, administrators and assigns as follows: That the party of the second part, his heirs and assigns shall not at any time hereafter erect or cause, procure, permit or suffer to be erected upon the hereby granted premises or any part thereof except as hereinafter provided any building other than a dwelling house to cost not less than \$4000.00 and which is to be at least 2 stories with attic in height and is to be arranged for not more than 2 families or which may be constructed

10

20

30

40

of brick and arranged in apartments and is then to be not less than 3 stories in height and to be arranged for not more than 3 families and if of brick and arranged in apartments shall be constructed with frontal dressed brick on the side of the building facing the street upon which the above described premises front, nor place, or cause, procure permit or suffer to be placed the front or exterior line of any part of said building so erected nearer than 10 feet to the line of the street in front of the above described premises and that the party of the second part, his heirs or assigns will at the time of the erection of any such building connect or cause the same to be connected with the sewer built in the street in front of the premises above described and that the said party of the second part, his heirs and assigns will not at any time hereafter erect or cause, procure, permit or suffer to be erected upon the rear of the lot or lots hereby conveyed or any of them any building to be used or occupied or for the purpose of being used or occupied as a dwelling house or habitation or any other building or buildings whatsoever except only that a private stable, barn or shed to be used in connection with the dwelling house upon said premises may be erected upon the rear end of the lot or lots hereby conveyed, nor at any time hereafter erect or cause, procure, permit or suffer to be erected on the premises hereby conveyed or any part of them any building or buildings to be used or occupied or for the purpose of being used or occupied for any purpose other than residential purposes nor at any time use or employ or

cause, procure, permit or suffer to be used or employed by his heirs or grantees, lessees or tenants of said premises or any part thereof or by any other person holding possession of said premises or any part thereof under his title any building erected or which may at any time hereafter be erected upon said premises or any part thereof for any purpose other than residential purposes, provided, however, that nothing herein contained shall prevent the said John G. Gerber, his heirs, executors, administrators or assigns from selling the lots as laid out on the map above referred to fronting on Bulls Ferry Road, free and clear of the above restrictions for store purposes for the sale of Merchandise, generally but not for Manufacturing purposes. This covenant shall run with the land until May 1st, 1920." 10
20

6. These defendants discovered also that the covenant last above recited had been inserted by the said John G. Gerber in many of the deeds made by him to various purchasers for other lots owned by him, laid out on a map made for and filed by him, being the same map on which the four lots above referred to are laid out and numbered fifty-two, fifty-three, fifty-four and fifty-five; that the existence of such covenants in the deeds to the complainants and to the other purchasers of lots on said tract laid out on said map was wholly unknown to these defendants, and had it been known, they would not have considered an exchange for said four lots, nor would they have signed the said articles of agreement, which were actually signed by them on the strength of the false representa- 30

tions made to them by the said complainant Conrad Muller.

These defendants therefore pray:

10 1. That said complainants may answer this counterclaim without oath and each statement therein make.

2. That a decree may be made to annul, set aside and avoid the said articles of agreement and declare the same of no force or effect whatsoever in law or in equity.

20 3. That a decree may be made declaring that these defendants are not bound to perform said agreement or to take title to said four lots agreed to be conveyed to them by said complainants.

4. That said complainants may be decreed to pay to these defendants all damages sustained by them arising out of the said false and fraudulent representations so made by said complainants or one of them as above set forth.

McDERMOTT & ENRIGHT,
Solicitors of Defendants.

30

40

Replication and Answer to Counter-claim.

IN CHANCERY OF NEW JERSEY.

Between :

CONRAD MULLER and ANNA
MULLER. his wife,
Complainants,
and

NATHAN WEISS and MAGGIE
WEISS, his wife,
Defendants.

On Bill, &c.

10

Complainants, Conrad Muller and Anna Muller, his wife, join issue on the answer of the defendants, Nathan Weiss and Maggie Weiss, his wife, and in answer to the counterclaim of the defendants to the bill of complaint filed herein, say that:

20

1. Complainants admit that in the month of December, 1915, negotiations were opened by the defendant, Nathan Weiss, with Conrad Muller, for the exchange of an apartment house as set forth in the bill of complaint herein, for four lots on the southerly corner of Sixth Street and Bulls Ferry Road in the Township of Weehawken, Hudson County, New Jersey. They also admit that said four lots were vacant, but they have no knowledge as to the intention of the said Nathan Weiss and leave him to prove the same as he may see fit. Complainants deny that during the negotiations aforesaid the complainant, Conrad Muller, exhibited to the defendant, Nathan Weiss, a blue-print as set forth in said counterclaim.

30

40

2. They admit that on or about December 23, 1915, the defendant, Nathan Weiss, and the complainants fixed the price at which the several properties were to be delivered when making the exchange and that shortly thereafter written articles of agreement were prepared by one Isador Haber, son of Hill Haber, the agent to whom the complainants agreed to pay a commission in said articles of agreement. They deny, however, that at the time these articles of agreement were being prepared the defendants had had no opportunity to inspect the deeds under which the complainants acquired the said four lots on the map of the premises; they further deny that the defendants were not familiar with the covenants or restrictions in said deed, or the actual dimensions of said four lots as laid down on said map; they admit that Nathan Weiss inquired of the complainant, Conrad Muller, what restrictions were on said property but deny that the defendant was told by the said Conrad Muller there were no restrictions except that saloon could not be conducted thereon, which said statement by the said Conrad Muller was false in fact and was known to him to be false and was made to the said defendant, Nathan Weiss, to induce him to sign said articles of agreement in which said four lots were to be conveyed subject to all restrictions and covenants of records, but say that when he asked the said Conrad Muller what restrictions were on the lots he told him he did not know—that he had been told that saloons were not allowed on said lands, but that he did not know just what the restrictions were, and therefore the scrivener inserted in the articles of agreement “subject to all restrictions.” These complainants further deny that the defendants were at that time

Replication and Answer to Counterclaim.

wholly ignorant as to the restrictions or restrictive covenants affecting said premises and would not have signed said agreement except for the alleged false statement made by the complainant, Conrad Muller.

3. These defendants admit that at the time of the preparation of said articles of agreement the said defendant, Nathan Weiss, inquired of the complainant, Conrad Muller as to the size of said lots but deny that he was informed by said Conrad Muller that the corner lot was 30 feet wide and 100 feet deep; they further deny that any statement was made by the said Conrad Muller that was false in fact and that any statement was made by him for the purpose of inducing said defendants to sign said articles of agreement and take title to said four lots; they further deny that any of said three lots were represented by the complainant as being 100 feet deep, but admit that said three lots were less than 100 feet deep. They say, however, that when the said defendant, Nathan Weiss, asked the complainant, Conrad Muller, how deep said lots were he told him that he did not know what the exact dimensions were; that they may be 90 feet deep, 93 feet deep, 95 feet deep or even 100 feet deep, but he said that he did know that the corner lot was more than 25 feet wide.

4. Complanants admit that at about the time when said articles of agreement were to be prepared the defendant, Nathan Weiss, inquired of the complainant, Conrad Muller, what it would cost to excavate the said four lots, but deny that he was told by him that he had an estimate for making such excavation, and say that he did tell him that

Replication and Answer to Counterclaim.

10 he had been told about six years ago that it would cost about \$2,000 to have the same excavated. These complainants say that they have no knowledge of what the defendants have since ascertained; but deny that Conrad Muller well knew that the cost of the excavation would exceed the sum of \$1500 or that he made the statement indicating that the excavation could be made for \$1500 in order to deceive the defendants and to induce them to sign said articles of agreement and take title to said lots.

20 5. These complainants further answering deny that the defendants were induced to sign the articles of agreement; they also deny that the defendants after the signing of the articles of agreement discovered that three of the four lots agreed to be conveyed by the complainants, namely, lots 53, 54 and 55 were of much less depth than 100 feet, and say that while the complainants did not know the exact dimensions of said lots the defendant, Nathan Weiss, had measured said lots just previous to that time and knew their correct dimensions; these complainants do not know what the defendants discovered about what it would cost to excavate the said lots and deny that they discovered on a serch being made against said four lots that in the deed made by John G. Gerber to the complainant, Anna Muller, conveying lots 54 and 55, the grantee covenanted that she would use said premises for dwelling and store purposes for the sale of merchandise generally, but not for manufacturing purposes; these complainants admit, however, that there were restrictive covenants in the deed to the said Anna Muller against using said premises to build anything excepting dwelling

40

Replication and Answer to Counterclaim.

houses, but they say that said covenants were put into said deed by mistake and that afterwards the said John G. Gerber (widower) executed to the said Anna Muller a deed releasing unto the said Anna Muller, her heirs and assigns forever, the restrictive covenants contained in the former deed from him to her. These complainants further admit that in the deed made by John G. Gerber and wife to Conrad Muller conveying lots Nos. 52, 53 and 56 the restrictive covenants set forth in the counterclaim of the defendants were contained. 10

6. These complainants have no knowledge as to what the defendants discovered about other deeds made by John G. Gerber to various purchasers on said map, but deny that the existence of such covenants in the deeds to the complainants and other purchasers of lots in said tracts of land was wholly unknown to the defendants; they also deny that had they been known to the defendants they would not have considered an exchange for said four lots nor signed said articles of agreement; they also deny that said articles of agreement were actually signed by said defendants on the strength of any false representation made to them by the complainant, Conrad Muller. 20

7. These complainants further answering say that by said articles of agreement the complainants agreed to convey said four lots subject to all restrictive covenants; they also say that none of the lots fronting on Bulls Ferry Road with the exception of lots 52 and 53 contained restrictive covenants and that these covenants were placed in said deed conveying lots Nos. 52 and 53 by mistake of the person who drew the deed. 30

40

8. These complainants further answering say that the restrictions on the lands and premises embraced in said map were not intended to apply to Bulls Ferry Road; that said restrictions were not uniform on all the lots on said map and that by the making and filing of said map no neighborhood settlement was ever intended.

These complainants therefore pray that the counterclaim to the bill of complaint should be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

WELLER & LICHTENSTEIN,
Solicitors for Complainants.

20

IN CHANCERY OF NEW JERSEY.

Between :

CONRAD MULLER et ux.,
Complainants,
and

NATHAN WEISS et ux.,
Defendants.

On Bill, &c.,
Final Decree.

30

This cause coming on to be heard in the presence of Weller & Lichtenstein, solicitors of complainants, and McDermott & Enright, solicitors of the defendants, and the pleadings having been read and the proofs and arguments of the respective counsel having been heard and considered, and this Court having duly considered the said pleadings, proofs and arguments, and it appearing to the Court that

40

the complainants are not entitled to the relief sought and prayed for by them in their bill of complaint,

IT IS on this 24th day of March, 1919, by Edwin Robert Walker, Chancellor of the State of New Jersey.

10

ORDERED, ADJUDGED AND DECREED that the complainants' bill be and the same is hereby dismissed, with costs.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the solicitors for said defendants be allowed a counsel fee of \$200.00, to be taxed as a part of said costs against said complainants and that execution issue for said costs, according to the practice of this Court.

20

Respectfully advised,

VIVIAN M. LEWIS,
V. C.

30

40

Q. Where do you live? A. 1093 Boulevard, West New York.

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

Q. And the other complainant is your wife? A. Yes, sir.

Q. What is her name? A. Anna. 10

Q. Do you remember signing the contract that has been offered in evidence? A. Oh, yes, yes.

Q. When was that signed; do you remember the date? A. Two days before Christmas.

Q. When did you first see Mr. Weiss about trading property with him? A. About two weeks before we did the deal, that is, before he came in my house, about two weeks before; I saw him in the butcher shop; Mr. Halt Haber was with him.

Q. What did Mr. Weiss and Mr. Haber say about that time? A. Mr. Haber brought the proposition up to me about his house. 20

Q. Whose house? A. Nathan Weiss' house, one of the defendants.

Q. What did they say about Mr. Nathan Weiss' house; what did Mr. Weiss say about it A. We talked about the proposition.

Q. What did you talk about? A. Well, he was asking to swop my lots for his house.

Q. Who said that? A. Mr. Weiss. 30

Q. What else was said? A. Then he set his price and I set my price; he set \$48,000 as his price, and I set \$15,000 for my lots.

Q. You did not come to any deal at that time? A. No, sir.

Q. How long after that did you see him again, or when did you see him again, if you know the date? A. It was on Tuesday, before Christmas.

Q. And Christmas was on a Saturday last year? A. Yes, sir. 40

Q. Where did you see him then? A. Up in my house.

Q. What did he say to you, if anything? A. Well, we started in to argue about the price, you know.

10 Mr. Weller: I merely want to prove the tender of the deed, that is all; I guess I will prove that by Mr. Haber.

I offer "Exhibit C-1" in evidence.

The Court: The contract is in evidence.

Cross-Examination by Mr. McDermott:

Q. Mr. Muller, didn't you see Mr. Weiss while this building was being put up on his property?

A. What is that

20 Q. (Question read). A. No, sir.

Q. You know where this building is? A. Yes, sir.

Q. Where is it? A. Fifth Street.

Q. Do you remember being around there? A. Yes, sir.

Q. Do you remember talking to him about it? A. No, sir.

Q. You never talked to him at all? A. No, sir.

30 Q. You spoke to him when you went by? A. No, sir.

Q. Didn't you know him? A. No, sir, I did not know Mr. Weiss at that time.

Q. And didn't you go over there and get some lime from that building for something? A. I got once a pan of lime there, and I spoke to a man there, and that was not Mr. Weiss that I saw after; the man that was there was there early in the morning, and I asked for a pail of lime for my chicken house, and he said "Yes."

40

Q. You say that was not Mr. Weiss? A. It was not Mr. Weiss.

Q. You say the first time you saw him was when he came in your store? A. Yes, sir.

Q. How long do you say that was before the contract was signed? A. That was about two weeks before the contract was signed. 10

Q. Mr. Haber was with you? A. I saw him at the store.

Q. When did you say you saw him again? A. Before Christmas.

Q. How long was that before the contract was signed? A. The contract was signed on Thursday night.

Q. Who came with him that time? A. Mr. Halt Haber.

Q. How long have you known Mr. Halt Haber? A. I talked to Mr. Haber about six or seven months before that; I gave him the price about my lots. 20

Q. Six months before? A. Yes, sir.

Q. How long had you known him? A. I never saw him before that.

Q. Six months before this transaction? A. Yes, sir.

Q. You knew him as a real estate agent? A. I did not know what he was.

Q. You did not know that? A. No, sir. 30

Q. But you gave him your lots to sell? A. He asked me for particulars.

Q. You authorized him to sell? A. Yes, sir.

Q. You gave him a price on them? A. Yes, sir.

Q. You knew him six months before you knew Mr. Weiss? A. Yes, sir.

Q. How long have you owned those lots? A. That must be over ten years; in 1906 I bought the first ones; I bought three that time. 40

MR. ISADOR HABER, sworn in behalf of the Complainants, testified as follows:

Direct Examination by Mr. Weller:

10 Q. You are an attorney at law of this state? A. Yes, sir.

Q. You drew the contract that has been offered in evidence here and marked "Exhibit C-1"? A. Yes, sir.

20 Q. And it says in that contract that the deed shall be exchanged on or before the first of January, 1916, at 10 o'clock, at the office of Isador Haber, Central Avenue, Jersey City, New Jersey, at No. 358 Central Avenue, Jersey City, New Jersey; what was done at your office, if anything, on that day? A. Mr. and Mrs. Muller were there, ready to close the deal, and Mr. Weiss, I believe, came there with Mr. Dippel. We tendered a deed and we tendered a bond and mortgage, and a check for \$1,000.

Q. Have you got that deed? A. That deed is here; I believe they are in your papers, in that little brown envelope of yours, Mr. Weller.

Q. Have you the deed? A. I have the deed.

30 Q. Was it already executed by Mr. and Mrs. Muller, the complainants? A. Yes, sir.

Q. Revenue stamps all on? A. Yes, sir.

Q. Would they take the deed? A. They would not accept the deed.

Mr. Weller: I offer the deed in evidence.

Mr McDermott: I object to the offer until I cross examine.

The Court: All right.

Cross Examination by Mr. McDermott:

Mr McDermott: I am cross examining only about this one item now.

Q. I understand you to say that this deed was there on the 31st of January? A. That deed was there? 10

Q. (Question read). A. I cannot answer that question, because there were a few words that were changed later on; it was that deed.

Q. You said this deed was there, executed and tendered? A. In the way it is now.

Q. As a matter of fact, this deed that you now produce is dated the first day of January? A. That is the time another tender was made.

Q. So that by no possibility could this deed have been there and executed and tendered on the 31st day of January? A. Not the way that deed is to-day. 20

The Court: I won't receive that now.

Mr. McDermott: It is dated as acknowledged the first day of February, and another piece of it is acknowledged on the 21st day of February.

Direct Examination (continued) by Mr. Weller: 30

Q. What was done on the 31st of January? A. Mr. Dippel, for Mr. Weiss, objected to the tender on the ground that in the first place they would not accept the check; in the second place, because, I believe, the deed recited that it was to be subject to a mortgage; they were to take the property subject to a mortgage which they assumed and agreed to pay. 40

Q. Was there any deed there on the 31st? A. Yes, sir, there was this deed with these few changes which were made to cure Mr. Dippel's objection.

Q. When was the acknowledgment taken? A. That same day, and then another acknowledgment taken on a later day with the corrections in it.

10 Q. Did you have another made; when did you have the next made? A. We had another made on the next day or a few days later.

By the Court

Q. Who made the corrections. A. I did, and we met again, a few days later, possibly.

Q. Did you take a re-acknowledgment? A. Yes, sir.

20 Q. Why didn't you make a new deed? A. There was just a few words to be changed.

Further Direct:

Q. What were those few words? A. To the best of my recollection, they objected to the words promising and agreeing to pay that mortgage.

By the Court:

30 Q. Do, as an actual fact, the deed which was to be delivered on January 31, was not delivered? A. It was not delivered.

Q. Objections were made and the thing hung over? A. Yes, sir.

Further Direct:

40 Q. When did they have their next meeting regarding this transfer? A. I cannot tell you exactly.

Q. Can you tell by referring to your affidavit? A. I possibly could.

Mr. McDermott: I object to his refreshing the memory of his own witness; I think this witness does not need any real refreshing.

The Court: He seems to need it.

10

By the Court:

Q. I want to get the next meeting; on January 31, they met and did not do anything; now, when did they do it?

Mr. McDermott: Witness is reading from his affidavit made on another occasion.

A. It was either a day or a few days later.

20

Q. Do you keep a diary? A. I have a diary.

Q. Would that help? A. My diary commenced either about that time or a short time after; now, that diary will show.

Further Direct:

Q. To your best recollection, how many days after was it? A. It could not have been more than one or two days later.

30

Q. When did you make the corrections on the deed which were suggested by Mr. Dippel? A. In between.

Q. Was there any notice on the bottom of the deed of the corrections? It appears to be dated on the first day of January, 1915, does that refresh your recollection? A. That must be the day upon which I made another tender of the deed.

Q. Where did you make the second tender? A. In my office.

40

Q. Was Mr. Dippel and Mr. Weiss there at that time? A. I think Mr. Weiss was there; I don't know whether Mr. Dippel was there.

Q. How could you make a tender without his being there? A. Mr. Weller was there.

Q. Was your father there? A. I don't recall.

10 Q. Did he accept the deed when you tendered it?
A. No, sir.

Q. You said they objected to a check; did you afterwards get the money? A. I went with Mrs. Muller to the bank on the corner of Fourth Street and Bergenline Avenue, and she drew out \$1,000 in bills.

Q. How long after the deed was that? A. Oh, that must have been—I cannot fix that time.

20 Q. About how long after the 31st of January or
the 1st of February? A. It may have been a week
or it may have been two weeks.

Q. What did you do with the thousand dollars?
A. I went with Mrs. Muller to the office of Mr. Dippel, the attorney for Mr. Weiss, and went there with the bond and mortgage and with the deed.

Q. What bond and mortgage?

30 A. A bond and mortgage which Mr. and Mrs. Muller were to give back to Mr. Weiss as a second mortgage on the premises, and we waited for Mr. Dippel until six o'clock, and then he came with Mr. Weiss back from Court and took us into his room and we tendered \$1,000 in cash—the deed as it stands today—and the bond and mortgage; and they refused to accept title because there were restrictions; I believe Mr. Dippel noted it down on a yellow pad at the time. Secondly, because the dimensions were not 100 feet—because the lots were not 100 feet deep, and they wanted some kind of an allowance on the contract, because they claimed

that Mr. Muller made representations about the cost of excavating.

Q. And they did not accept your tender at that time? A. They did not.

Q. When did you see them again? A. I think right after that I called at your office and placed the matter in your hands. 10

Mr. Weller: On the 31st of January, your Honor will notice on the deed that there was a separate acknowledgment on an outside paper.

The Witness: This was the original deed, and I believe the parties came together on the first of February.

Q. Do you remember making these erasures to cure the defect which Mr. Dippel complained of? A. Yes, sir. 20

Q. Then those erasures were made before execution? A. Yes, sir.

Mr. McDermott: I object to that question, obviously they were made after execution.

By the Court: 30

Q. You as an actual fact, did not take the acknowledgment to this deed on the first day of February, as you stated in your opening? A. There was an acknowledgment taken the first time, and an acknowledgment taken just before we came to Mr. Dippel's office a few weeks later.

Q. Have you noted the date on the second acknowledgment? A. I think so. 40

Q. When do you think you took the second acknowledgment? A. Just before we came to Mr. Dippel's office, a few weeks later.

Q. Then those delays were made for the purpose of curing these defects which Mr. Dippel complained of? A. Yes, sir.

10

Further Direct:

Q. When was it you got the deed from Mr. Gerber? A. That was between the first of February and that acknowledgment on the 21st of February; I went to Mr. Weiss' house a few times, but he was never home; his wife always told me he was on the job at another building; I was trying to get Mr. Weiss, to bring him down to Mr. Dippel's office.

20

By the Court:

Q. After Mr. Dippel and you and Mr. Weiss had had negotiations you did not go along and get Mr. Weiss? A. No, sir, only to serve him with a subpoena.

Further Direct:

Q. Where is the deed from Gerber to Muller? What is the date of that deed? A. This is an old deed from Gerber to Muller.

30

Q. I want the one that you got to cure the title; now, what is the date of it? A. The 3rd of February, 1916.

Q. Is that deed executed? A. It is.

Q. By Mr. Gerber? A. Yes, sir.

Q. After you got that deed, what did you do with it? A. I took that deed, together with the other deed, the bond and mortgage, and the cash, and went up to Mr. Dippel's office.

40

Q. That was on the 21st of February? A. Yes, sir.

Q. Were your clients with you? A. Mrs. Muller came up, and later on Mr. Muller came up.

Q. Now, at Mr. Dippel's office, what did Mr. Weiss say as to whether he would take this title or not? A. He really left it all to Mr. Dippel, they were arguing for an allowance on account of the shortage; I believe \$500.00 was mentioned; they objected to the title at that time on the ground of the shortage, the dimensions and the restrictions, and I believe also on account of the estimated cost of excavations. I believe they were the only grounds of the objection to the title. 10

Q. Was any objection made to the deed? A. Mr. Dippel carefully looked over the deed, and I had already inserted before in the corrections which he had complained of, and he found no objection to the deed; one of the objections before that being that the contract called for a conveyance of the right, title and interest of the grantor in and to the middle of the street, and I inserted that in that deed, and there were no objections to that deed, or bond and mortgage, or the tender of the cash. 20

By the Court:

Q. They objected to all those things at the time the deed was offered? A. Yes, sir. 30

Cross Examination by Mr. McDermott:

Q. May I see the Gerber deed? A. Here it is.

Q. This deed from John G. Gerber to Conrad Muller, dated February 3rd, acknowledged February 3, 1916, did you prepare that deed? A. I did, yes, sir. 40

Q. And did you take Mr. Gerber's acknowledgment? A. I did.

Q. And, Mr. Haber, I understood you to say in answer to Mr. Weller, that you drew the contract?

A. Yes, sir.

10 Q. And later, you prepared the deed which has been shown you, made by Muller and wife to Weiss?

A. Yes, sir.

Q. Whom did you represent in this transaction?

A. At the time of drawing the contract I represented both parties.

Q. And whom did you, represent when you took this deed over? A. At that time I was retained by Mr. and Mrs. Muller to make a search and prepare a deed, so I was representing them.

20 Q. You felt under no obligations to Mr. Weiss then? A. Not at that time.

Q. At the time this deed was taken over originally, you had inserted an assumption of this mortgage? A. Yes, sir.

Q. \$2,500.00 mortgage by Mr. Weiss? A. Yes, sir.

Q. You knew that had not been agreed to? A. When my attention was called to it, I realized that.

30 Q. Yet you wanted to put that in? A. I put that in inadvertently; it never dawned on my attention until Mr. Dippel complained of it, and then I immediately struck it out.

Q. Don't you know that an assumption of a mortgage carries some liability? A. Yes, sir.

Q. Then you erased that? A. Yes, sir.

Q. When did you erase that? A. I don't just recall, but it was before another tender was made.

Q. Did you erase that in Mr. Dippel's presence? A. No, sir.

Q. Did you insert the words "covering to the middle of the street?" A. Yes, sir.

Q. When did you do that? A. Also before another tender was made.

Q. At the time you went over it, on one of these occasions, you had a bond and mortgage, \$6,500.00?

A. Yes, sir.

10

Q. Signed by Anna Muller alone? A. Yes, sir.

Q. And you tendered that? A. Yes, sir.

Q. Did you tender that with the idea of putting it over Mr. Weiss a little bit? A. No, sir.

Q. You knew the husband had to sign the mortgage? A. I considered that a purchase money mortgage, and the wife could sign it without the husband, and could acknowledge it without the husband; I thought so then.

Q. Didn't you really do it in order to put it over Mr. Weiss? A. No, sir.

20

Q. Just as you did in the \$2,500 assumption in the mortgage? A. No, sir.

Q. At that time you were getting it in for Mr. Weiss? A. Absolutely not.

Mr. Weller: Objected to as incompetent, irrelevant and immaterial; this was the mortgage.

The Witness: I should not have put it in; I thought, and I think yet, that it was a purchase money mortgage.

30

By Mr. Weller:

Q. The mortgage that you took back was to be given on the property that Weiss was to deed, and that had not been done?

Mr. McDermott: Objected to.

40

The Court: Strike that out.

Mr. Weller: There could not be any tender of mortgage on the wife's property.

The Court: I will allow it as material and relevant.

10 Further Cross:

Q. You said you made these changes in the deed; then you changed the mortgage, too, or didn't you ever change that, the \$6,500 mortgage which you say you tendered—was that ever signed by Mr. Muller? A. I don't recall, unless I look at it.

Q. Let us see it now. A. Here is the bond and mortgage.

Q. You have it? A. Yes, sir.

20 Q. Now, this is dated the first day of February, and this was acknowledged the first of February; now this acknowledgment on the first of February says this: "Be it remembered that on the first day of February, 1916, before me, the subscriber, an attorney-at-law of the State of New Jersey, personally appeared Conrad Muller and Anna Muller, husband and wife," and then the ordinary form of the acknowledgment; now, as a matter of fact, when you took that over, it had been acknowledged only by Mrs. Muller, hadn't it? A. I don't recall that.

30

Mr. Weller: I object again to this, your Honor, because it is absolutely immaterial for this reason: he could not make any tender, no matter who signed it or when it was.

Q. When this bond was drawn, the name of Conrad Muller was not in it at all, was it—first? A. No, sir.

40

Q. You had it typewritten in above—"Conrad Muller and"— A. Yes, sir.

Q. Up above? A. Yes, sir.

Q. And the shape you presented it first, it was only signed by Anna, wasn't it? A. I believe that is right, yes, sir.

Q. Do you remember when that was? A. That 10
was the first time we made the tender.

Q. Then you changed that bond and mortgage?
A. Yes, sir, to clear Mr. Dippel's objection.

Q. You changed this and let the acknowledgment stand, did you? A. I don't recall whether I let the acknowledgment stand or whether I took a new acknowledgment.

Q. Now, attached to the mortgage is a loose acknowledgment, signed by you, dated the 21st day of February; when did you attach that to this mortgage? A. Before that other tender was made, 20
before the tender on the 21st.

Q. And when did you attach this acknowledgment? A. I attached it before I went over to Mr. Donovan's office; I presume it was done the same day; I don't recall that.

Q. Was anyone there when you signed the acknowledgment, was anyone present? A. My office boy.

30

By the Court:

Q. The Parties were present? A. Yes, sir.

Further Cross:

Q. You made the change in the deed without their being present? A. Yes, sir.

Q. Did you notify them? A. I told them the changes before they re-acknowledged.

40

Q. When you say you took this acknowledgment on the deed now, which apparently is dated the 21st of February? A. It must have been the day on which the acknowledgment reads.

10 Q. You think so, are you sure about that? A. I am under oath, and I would not say that I am sure about it.

By the Court:

Q. Why wouldn't you, as an officer of the Court, why wouldn't you say that you are sure? A. I took the acknowledgment on the date I said, on that certificate of acknowledgment.

20 Q. Now, Mr. Haber, don't you know, as a matter of fact, that that acknowledgment was not there when you made the tender? A. On the 21st of February?

Q. Yes. A. It certainly was, positively.

Q. Why didn't you fasten it on in some secure sort of way, instead of attaching it with the little clip? A. As a matter of fact, I have one of those little clip fasteners and it did not work, so I clipped it down with one of those fasteners.

Q. You did not fasten it with that? A. No, sir.

30 Q. Mucilage and paste are still available? A. Yes, sir.

Q. Why was it necessary to take that second acknowledgment at all on the deed, now? A. I don't recall; it was necessary because there were changes between the first acknowledgment and the second.

Q. That is the reason you did it? A. Yes, sir.

Q. Referring now to the mortgage, can you tell us when Conrad Muller signed that mortgage? A. I think it was on the 21st of February.

Q. Are you sure about that? A. Quite sure about it.

Q. What about this acknowledgment dated the first day of February; that seems to have Conrad Muller's name in, too? A. Well, I believe that he had seen that at the same time when Muller had signed it the first time. 10

Q. Don't you know you have already sworn that when this mortgage was tendered, that Conrad Muller had not signed it? A. I said that.

Q. Then it cannot be so that he signed it when she did, that is impossible, isn't it? A. No, sir, it is not impossible.

Q. What is the fact about it, then; you say your best recollection is, that Conrad signed on the 21st; now, I call your attention to the acknowledgment there, which apparently is included in this acknowledgment on the first day of February— A. 20
As a matter of fact, I have not got these facts clearly in my mind, but I believe that my former statement was right, that Conrad Muller did not sign at the same time that Anna Muller did, but that he did sign subsequent thereto, and I believe before the 21st; and on the 21st I took this acknowledgment; I am not even positive about that.

Q. What makes you say he signed at the same time as his wife; you know one of the objections raised by Mr. Dippel was, that the husband had not signed this mortgage? A. I understand. 30

Q. Then he could not have signed at the same time as his wife? A. No, sir, but he could have signed the same day.

Q. You mean some other time that day? A. Yes, sir.

Q. When you took this mortgage to Mr. Dippel, the wife only had signed it? A. I know that Mr. 40

Dippel objected to it, because it was not signed by both parties.

Q. And the wife had signed it? A. Yes, sir.

Q. When you attempted to tender it at that time, there was an acknowledgement on it? A. Yes, sir.

10 Q. And that acknowledgment contained only the name of Anna Muller? A. I am not positive about that.

Q. How could it contain anything else when no one else had signed the mortgage? A. It may have been that when the boy drew up the acknowledgment he put in two names; he may have inserted both names in the acknowledgment.

By the Court:

20 Q. Was it taken by you as a Master? A. No, sir, as an attorney-at-law.

Q. Reverting to the contract, was Mr. Dippel with Mr. Weiss at the time the contract was signed? A. No, sir, I was representing both parties at that time.

Further Cross Examination:

30 Q. I think you have already said that your father was the agent in the matter? A. I did not say that, but that was the fact.

Q. And this contract was signed late at night? A. Yes, sir.

Q. Where? A. At Mr. Muller's house.

Q. I understand at all times that Mr. Dippel for Mr. Weiss, objected to the restrictions? A. Yes, sir, every time he objected to the restrictions; he noted it down.

40 Q. And also objected to these other things—the shortage in the area? A. In the dimensions, yes, sir.

Q. Did you and he figure out the shortage? A. What do you mean?

Q. I mean, figure out from the deed how much the deficiency was? A. We did mention the difference between the actual measurements and what they claimed they were entitled to.

Q. Do you remember how many square feet it was? A. I don't believe we figured out the square feet; I don't recall. 10

Q. The acknowledgment on this mortgage was first acknowledged, I understand, or first signed by Anna Muller? A. Yes, sir.

Q. Where did you take her acknowledgment?

Mr. Weller: I again object to this on the ground that it is incompetent, irrelevant and immaterial, and could not become material until Mr. Weiss had given a deed so the mortgage would have something to take effect on. 20

The Court: Objection overruled.

A. I had her part sign it in my office when Mr. Dippel and Mr. Weiss were there; I believe it was signed in their presence.

Q. By her? A. Yes, sir. 30

Q. Mr. Muller was there then? A. Yes, sir.

Q. He did not sign it then? A. I don't remember that.

Q. Didn't you say a little while ago that you went down to his shop and got him to sign? A. I remember going down to his place of business after Mr. Muller and Mr. Weiss had left my office—Mr. Dippel and Mr. Weiss had left my office, I mean.

Q. Then you went down to the shop? A. Yes, sir, into his store, and I believe that Mr. Muller 40

signed it down there; I am not positive about that; it was signed on that day. .

Q. You begin to be sure about that, do you, now?

A. No, sir, I am no more positive about it now than I was before.

10 Q. For some reason, you thought this paper should be reacknowledged on the 21st of February?

A. There were changes made in the deed.

Q. I am speaking of the mortgage? A. In the mortgage I did take a re-acknowledgment on the 21st.

Q. Where did you take that? A. I don't recall where I took that.

20 Q. Where do you think it was first? A. It may have been in Mrs. Muller's house; it may have been at Mr. Muller's store. I know I was running around for them that day to bring them up to Mr. Dippel's office; I had both of them at Mr. Dippel's office.

Q. Do you remember whether Mrs. Muller was present when you took that acknowledgment on the 21st? A. Sure, she was present when I took her acknowledgment—

30 Mr. Weller: I offer in evidence now the deed that you wish to cross examine on. I offer the deed from Conrad Muller and wife to Nathan Weiss, bearing date February 1, 1916, acknowledged February 1, 1916, and re-acknowledged February 21, 1916.

Mr. McDermott: I object to this instrument as a valid deed; the testimony of the witness.

40 The Court: I think you had better hold that deed for the present, and I will consider the proposition; I will take your offer and withhold it.

(After further argument.)

The Court: I will receive the deed and I will note an objection to it on the ground that it is not a valid instrument and incompetent and immaterial..

Marked "Exhibit C 2."

10

Re-direct Examination by Mr. Weller:

Q. Before the tender was made on the first of February, before you tendered your deed, did Mr. Weiss say whether or not he would take title to the property? A. I don't think I saw Mr. Weiss in between the time the contract was made—

Q. Listen to my question (question read) A. He did—both he and Mr. Dippel were in my office, and ready to close the title, and Mr. Dippel spoke up, I believe, and said he would not take the title; I had all the papers prepared; Mr. and Mrs. Muller were in my office when Mr. Dippel came in with Mr. Weiss; I believe my father was there at the time, and I said. "The papers are all ready to be signed, and Mr. Dippel said, "Well, we refuse to take title"; and Mr. Dippel looked over the deed, and he read over the bond and mortgage, and then he stated his objections; the objections were on the ground that the deed recites a clause "Subject to all restrictions of record"; second, "because the dimensions of the lots are not as represented to be"; third, "because the deed recites 'subject to a mortgage which they assume and 'agree to pay"; and fourth, "because the deed omits in its description that it grants to the grantee all the right, title and interest of the grantors to the middle of the street; and also because Mr. and Mrs. Muller did not join in the bond and mortgage; and because the

20

30

40

estimated cost of excavation was not as represented." Now, I think those were the six objections.

By the Court:

10 Q. What did you say? A. I told Mr. Dippel, in the presence of this Mr. Weiss, that I would insert the clause granting the right, title and interest of the grantors to the bed of the street out into the middle of the street; that I would have both Mr. and Mrs. Muller execute the bond and mortgage, or that I would erase, or I would leave out the clause whereby the grantees assume the payment of the first mortgage; I think that was all.

20 Q. What did Mr. Dippel or Mr. Weiss say to that; did they say they would take it then? A. No, sir.

Q. As I understand, these insertions in the deed, subject to the mortgage, were put in by you? A. Yes, sir.

Q. And without charge? A. Yes, sir, without charge from anyone.

Q. And they were not part of the original agreement? A. That is right.

30 Further Re-direct:

Q. Now, then, before you made the tender with these changes on the 21st of February— A. Just a moment; I recall when Mr. Dippel objected to the restrictions I said, "Well, we will try to get a deed curing those restrictions, and that is how I came to go to Mr. Gerber later on.

By the Court:

10 Q. That is how you came to get the deed from Mr. Gerber? A. Yes, sir.

Further Re-direct:

Q. Between that time and the 21st of February, when you made the tender, when you tendered the \$1,000 cash instead of the check, and after these papers had been corrected, did Mr. Weiss or his attorney say whether or not they would take title? 10
A. They did not say at that time.

Q. When you went up there with the corrections, what did they say about taking title, on the 21st day? A. I went up with Mr. and Mrs. Muller to Mr. Dippel's office, and Mr. Dippel returned very late with Mr. Weiss, and I again made a tender of the \$1,000 in cash, the deed, the bond and mortgage. Mr. Dippel then again carefully read over the deed and read over the bond and mortgage, and he noted down on a yellow pad—I think it was—his objections; which were that there were restrictions on record, and they were supposed to take free of restrictions; that the dimensions were not as represented, and that the estimated cost of the excavation was not as represented. 20

Q. He did not reject the title then on account of the papers which you tendered? A. No, sir.

Mr. McDermott: Objected to as leading.

The Court: Objection sustained. 30

Q. Did he reject the title on any other grounds, except the three grounds which you have stated? A. No, sir; after he had read over the papers he found no fault with them, and did not express himself as finding any fault with them.

Re-cross Examination by Mr. McDermott:

Q. On this occasion on the first of February, Mr. Dippel said he would not take the title for these 40

various reasons which you have given? A. Yes, sir.

Q. And one was, the assumption of the mortgage, and sought to cut that out of the deed? A. Yes, sir.

10 Q. The other was, the deed did not go to the middle of the street, and you sought to put that in—added that to the deed? A. Yes, sir.

Q. And then he objected to the restrictions? A. Yes, sir.

Q. And you told him you would see Mr. Gerber, and see if you could not get a deed to remove the restrictions? A. Yes, sir.

Q. And you did see Mr. Gerber and got the deed which you produced here this morning? A. Yes, sir.

20 Q. That was done because of his insistent that the restrictions should be removed? A. Yes, sir.

Q. Was anything said there by Mr. Weiss about restrictions at that time? A. Yes, sir, he said he did not want to buy it subject to restrictions, so I told him the contract provided for it.

30 Q. And had not intended to buy subject to restrictions—did he say that? A. He said he would not take the property with those restrictions on; that his attorney had made the search, and found he could not build big houses on it; he said he could not put big houses on it.

Q. Did Mr. Muller say anything about the restrictions—on this first day of February? A. Yes, sir, in answer to Mr. Dippel's question, Mr. Dippel asked him something to that effect.

Q. Mr. Dippel asked him whether he had not said there were no restrictions except a saloon—that there could be no saloon? A. Yes, sir.

Q. And Mr. Muller said that he had said so?

A. No, sir.

Q. Didn't he say that both in the presence of Mr. Dippel and Mr. Davis, and also Mr. Weiss?

A. Mr. Davis was not present.

Q. Was not Mr. Davis there on one occasion?

A. I don't recall him being there—I won't say that he was not there. 10

Q. Mr. Haber, on this same occasion, February 1st, whatever took place was at your office, wasn't it? A. Yes, sir.

Q. Now, don't you remember that Mr. Davis came in with a search while you were there? A. Yes, sir, I recall him coming in with a paper.

Q. So that he was there? A. Yes, sir.

Q. And certainly, some conversation took place in his presence? A. Well, there was a conversation in his presence; how much, I don't know. 20

Q. Wasn't there a conversation relating to restrictions, in his presence? A. I cannot say.

Q. You remember Mr. Dippel taking Mr. Muller with the fact that he had made this statement that there were no restrictions except a saloon?

A. He asked him that question, yes, sir.

Q. And, of course, you knew there were restrictions, of course? A. Yes, sir, Mr. Dippel told me there were restrictions, and I had that deed before me. 30

Q. And there is a whole page of that deed covered with restrictions? A. Yes, sir.

Q. The deed from Gerber to Muller? A. Yes, sir.

Q. Nobody could fail to notice that? A. I failed to notice it.

Q. Have you the deed? A. Yes, sir.

Q. Let us look at it. Now, referring to this deed from Gerber to Muller, dated June 1st, 1906, the whole second page substantially is taken up with single space typewriting—is taken up with these restrictions? A. Yes, sir.

10 Q. And on the third page the habendum clause and the clause beginning "Together," etc., is struck out? A. Yes, sir.

Q. Would you like to have the Court believe that you did not notice that? A. I glanced at that page; I did not know the contents.

Q. That absolutely escaped your attention? A. Yes, sir, I admit looking at that page.

Mr. Weller: You are referring to the first of February.

20 The Witness: Is this the first of February? That is the deed from Gerber to Muller which contains the restrictions. What date are you referring to now, when that escaped my attention?

Q. I am speaking now of the first of February. On the first of February, speaking about that, you say then that you did know of these restrictions?

30 A. I did know I saw them on that deed, because Mr. Dippel called my attention to them.

Q. Who had the deed? A. I had it.

Q. And it needed somebody to call your attention to this page of restrictions, did it? A. Yes, sir.

Q. And if he had not called your attention to that, I suppose you would not have seen it at all? A. Mr. Dippel came in the office—

Q. Answer the question? A. I cannot answer that question.

40

Q. Do you mean for a moment to have the Court think that unless someone had called your attention to that typewritten page of restrictions, that you would not have seen it? A. I cannot answer that.

Q. The fact is, that no one could miss seeing it?

10

Mr. Weller: I object to the question.

The Court: The objection is sustained; it calls for a conclusion.

Mr. McDermott: I am asking about the first of February, and I understand now that on the first of February, after he had drawn another deed from this deed, he had drawn the deed which is dated February 1st, from this old deed which is dated June 1st—that after he had done that and had the new deed, and as he says, read the tender, that he still did not notice this until Mr. Dippel called his attention to it.

20

The Witness: Mr. Dippel called my attention to it in my office on the first of February.

Q. Did you think you were really drawing a deed, or what did you think you were doing? A. I was drawing a deed.

30

Q. A deed which had some relation to the deed from Mr. Gerber to Muller? A. Yes, sir.

Q. And you recited that it was subject to restrictions? A. I recited it was subject to restrictions, because I took hold of the contract.

Q. Didn't you say it was subject to restrictions? A. Yes, sir, I did, because the contract provided for it.

40

Q. Mr. Haber, Mr. Dippel, you say, called attention to those restrictions? A. I think he did, yes, sir.

Q. In this same deed that I have shown you? A. Yes, sir.

10 Q. What did he say to you about these restrictions at that time? A. He said that you could not build a big house on the property, and Mr. Weiss wanted to erect a big house, and that is the reason he would not take title.

Q. Didn't he ask you then why you did not call Mr. Weiss attention to the restrictions when the contract was signed? A. I believe he did.

Q. Do you remember what you said to him? A. I told him I did not see them at the time.

20 Q. That you were busy drawing the contract and did not hear what took place? A. I did hear what took place.

Q. Didn't you say to Mr. Dippel that you were busy drawing the contract and did not hear what took place? A. No, sir, I never said that to him.

Q. You did not say that in his presence and Mr. Davis' presence? A. No, sir.

Q. Perhaps Mr. Davis was not present at that time? A. I don't know.

30 Q. Whatever Mr. Muller had to say, he said then? A. Yes, sir.

Q. About Mr. Dippel asking Mr. Muller, didn't he tell Mr. Weiss that there were no restrictions on the property except against a saloon? A. Yes, sir.

Q. What do you say Mr. Muller said? A. Mr. Muller said, "I don't know what restrictions are on it, I heard that I could not put a saloon there."

40 Q. You say he said that to Mr. Dippel on this occasion? A. Yes, sir.

Q. That is what you say he said? A. Yes, sir, words to that effect.

Q. Did not Mr. Dippel say to him that he had told Mr. Weiss that there were no restrictions on it except that he could not have a saloon? A. Mr. Dippel did tell that to Mr. Muller.

Q. And did not Mr. Muller say that that was so? 10
A. No, sir.

Q. That he had told him that? A. No, sir.

Q. And didn't he say that he had told him that, and that he did not know at the time that there were no restrictions? A. No, sir, he did not say that.

Q. Didn't he say substantially that he had told Mr. Weiss that? A. No, sir.

Q. Well, Mr. Haber, if he had not said something like that, why were you so anxious to get the deed removing the restrictions? A. Because I figured that if I could get Mr. Gerber's deed, then that would cover whatever objections they might have; I told Mr. Dippel and Mr. Weiss at the time— 20

Q. But if Mr. Muller had not made any representations about it, why did you care? A. Because it would be an easy way of closing up the title; I told Mr. Dippel that under the contract he would have to take it anyhow, but that I would try and get a deed from Mr. Gerber; that is what I told Mr. Dippel. 30

Q. You remember there was a very warm contest about these restrictions, at your office? A. Yes, sir.

Q. Mr. Haber, do you mean to say that you did not tell Mr. Dippel that you did not hear the conversation as to restrictions? A. If I did not hear the conversation, I could not put in the words 40

“Subject to all restrictions”; I never told that to Mr. Dippel—

Q. When you put that “subject to all restrictions,” didn’t you look to see what the restrictions were?

10 Mr. Weller: Objected to on the ground that that does not mean anything.

A. Show me the contract, and I will show you exactly.

(Mr. McDermott hands contract to witness.)

The Witness: I don’t want the contract; I want the deed.

20 (Mr. McDermott hands the deed to the witness.)

30 Q. (Question read.) A. I finished inserting the description in the contract after reading the first page of the deed, from Mr. Gerber to Mr. Muller, which contains the description; I then turned the leaf and saw the first words “Together”—and “Also,” “Together” being the beginning of one clause; and “Also” the beginning of another clause; so I figured this is the end of the description and there are no mortgages there, because when you get the words “Together” with and “Also,” that shows you are finished with the description and you are finished with any subject clause; and then I saw a whole lot of writing, and I turned the leaf down, because I came across deeds like in the Hoboken Land Improvement Company, where there is a whole page full of covenants about laying tracks and erecting poles, etc., etc.; there were two

40

deeds handed to me, because Mr. Muller got their property by two deeds; I finished copying the description of one, and took the other deed, and it was late at night, and Mr. Weiss, when I drew the description—

Q. I have not asked you any more; I think you have answered my question; your idea is, then, when you see a large number of these conditions or restrictions about nuisances, to pay no attention to them? A. Well, it was late at night. 10

Q. Did you look to see whether these were covenants or restrictions? A. No, sir, I did not pay any attention to them; I just looked at the top of the sheet and slapped it down again; it was about 12 o'clock at night.

Q. Then you put in this contract, "Subject to all restrictions of record," without examining them at all? A. For this reason, that Mr. Weiss, when he gave me his deed so that I could put the proper description in the contract, I noticed it said, "Subject to all restrictions of record"; it was a short line; that was the property he was conveying, so when I got there with the description of Mr. Muller's property I said, "There are restrictions on Mr. Weiss' property, and I am putting them in the restrictions, and what restrictions are on your property?" and Mr. Weiss spoke at the same time, and they had that conversation. 20 30

Q. You inquired what restrictions there were on Mr. Muller's property? A. Yes, sir.

Q. And Mr. Muller is not a lawyer? A. No, sir.

Q. Then Mr. Weiss inquired of him what the restrictions were? A. Yes, sir.

Q. Up to that time had anything been said about what Mr. Weiss was going to do with the property? A. No, sir; I did not hear anything. 40

Q. You were pretty busy getting these papers ready? A. I was drawing up two contracts.

Q. Late at night? A. Yes, sir.

Q. And rushing them through? A. As quickly as I could.

10 Q. And then, after you began inquiring about these restrictions, did you look at the deed then?

A. No, sir.

Q. You represented Mr. Weiss at this time? A. I represented both parties.

Q. And you considered it was up to you to look after both of them? A. Yes, sir.

20 Q. And did you think it was any part of your duty to advise either one of them as to the restrictions? A. Just as I told you before; I told Mr. Muller, "Well, in the description from Mr. Weiss' property, I am putting in 'Subject to all restrictions of record'; now, what restrictions are on your property?" I asked that of Mr. Muller, and then Mr. Weiss asked the same thing; he became interested; he spoke about it.

Q. When he did that, and you represented him, didn't you think it was part of your duty to advise him as to what restrictions were in that deed? A. I did not know what were in the deed.

30 Q. You had the deed before you? A. I admit that.

Q. Did you read the deed? A. I read enough to get the descriptions; when I turned that leaf over I saw the word "Together" and "Also."

Q. You thought they were just those ordinary restrictions that are in the Hoboken Land Improvement Company? A. Something like that.

40 Q. And Mr. Weiss, though, became more interested in that than almost anything else? A. He was speaking about other things.

Q. And I want to know if you did not think it was your duty then to look at the deed so you could advise Mr. Weiss, as his lawyer, what restrictions this contract was subject to? A. If I knew the restrictions were there, I would have advised him; I did not look.

Q. With these papers before you? A. Yes, sir. 10

Q. And that is the only reason; if you had seen them, you would surely have told him? A. Positively; I did not know Mr. Muller any more than I knew Mr. Weiss.

Q. I understand you say you represented Mr. Weiss then? A. Yes, sir.

Q. You had an idea, you say, that they were something like the Hoboken Land Improvement Company? A. I did not know just what they were.

Q. Did you ever read those Hoboken Land and Improvement restrictions? A. I did, on and off. 20

Q. Now, they are both strict, are they not? A. All I remember about them is, about laying sewer pipes and laying tracks and erecting poles, and the use of the premises.

Q. And you thought these arrangements were restrictions on the use of the premises of that same general character? A. Of that nature; yes, sir.

Q. So when Mr. Weiss showed an interest in these restrictions, you did not look at the deed? A. No, sir. 30

Q. Now, Mr. Haber, Mr. Dippel called your attention to that when you were over there? A. Yes, sir.

Q. Said you ought to have told Mr. Weiss about it? A. Yes, sir.

Q. And you said you were so busy, and that you did not hear the conversation? A. I told him I was busy, and that is the reason I rushed that through. 40

Q. And that you did not hear the conversation between Muller and Weiss? A. No, sir—I heard all the conversation all right.

10 Q. Do you remember what Mr. Weiss said when he made his inquiry then? A. He said to Mr. Muller, he said, “Yes, what restrictions are on this property?” and Mr. Muller said, “I don’t know; and I heard that I could not put a saloon on it”; I think he even said, “The town of Weehawken won’t allow me to put a saloon on”; and Mr. Weiss said, “That is right, he is not going to build any stores.”

Q. What had that to do with saloons? A. Because Mr. Muller said he heard he could not put a saloon there, and Mr. Weiss said, “That is right, I am not going to put any stores on my building.”

20 Q. Mr. Muller is an intelligent man? A. Yes, sir.

Q. And he brought you this deed? A. I think Mrs. Muller went and got them.

Q. He gave you both deeds? A. Yes, sir.

Q. And he can read and write? A. Yes, sir.

Q. Mr. Muller can? A. Yes, sir; he was reading it over with Mr. Weiss.

Q. And you said you heard him say that he did not know what the restrictions were? A. Yes, sir.

30 Q. And you knew that this was a deal involving something like \$60,000? A. Yes, sir.

Q. And that it was a matter of vital interest to Mr. Weiss whether there were restrictions or not? A. He wanted to know what the restrictions were.

Q. And when the other man told him he did not know what they were, you never took the trouble to look through the deed to see what they were? A. That is right.

40 Q. Now, Mr. Haber, isn’t it a fact that Mr. Mul-

ler said there were no restrictions except that you could not have a saloon there? A. No, sir; he did not say that.

Q. Now, you say you heard the conversation?
A. Yes, sir.

Q. And as an attorney of this court you thought that your duty was fully performed when you let one man to a contract say he did not know what the restrictions were? A. Yes, sir; he said he did not know what the restrictions were, so I said to Mr. Weiss, "We don't know what the restrictions are; I am here to represent both parties, and to protect both parties; I will put 'subject to restrictions' in his because you have 'subject to restrictions' in yours." 10

Q. That is your conception of your duty to a client? A. I really believe I was derelict, I will admit that, but that is the situation; possibly, if it had been in the afternoon I would have taken more time, but it was about midnight. 20

Q. You have no doubt that Mr. Weiss was misled by that? A. It appears so from what he says now.

Re-direct Examination by Mr. Weller::

Q. You say that Mr. Weiss said he was going to put up a big house; did he say what kind of a house? A. I did not say he was going to put up a big house. 30

Q. Yes, you did; you said Mr. Weiss said he wanted to put up a big house there? A. Mr. Weiss said he would not put any stores up in the houses there that he was going to put up there.

Q. Now, when the contract was drawn, did Mr. Weiss read it over? A. Yes, sir, he did; he had it in his hand. I had one copy in my hand reading 40

it for the benefit of Mrs. Muller; Mr. Muller and Mr. Weiss were sitting together; I think one of them was on the arm of the chair of the other, and one had a copy of the contract by one hand, and the other had the same contract, holding it in the other hand, and they were both reading it over—

10 Q. And Mr. Weiss was holding it? A. Yes, sir; he was following it as he was reading it.

Complainant rests.

NATHAN WEISS, sworn in behalf of the defendants, testified as follows:

20 Direct Examination by Mr. McDermott:

Q. Where do you live? A. 568 Twelfth Street, West New York, New Jersey.

Q. What is your business? A. Builder.

Q. And did you own a property, you and Mrs. Weiss, or did you own it? A. I owned it.

Q. The property lots 14 and 15 in Block 10? A. Yes, sir.

Q. Did you put a building on that property? A. Yes, sir.

30 Q. More than one? A. On that property I put on one building, five stories.

Q. How long have you been in the building business? A. Going on three years.

Q. Did you know the property that has been referred to on the corner of the Bull's Ferry Road and Sixth Street? A. I knew it by passing there once in a while.

Q. And that is a block of four lots all together, isn't it? A. Yes, sir.

40

Q. A large vacant lot? A. Yes, sir.

Q. Do you know Mr. Muller, Conrad Muller? A. Yes, sir; I know him now.

Q. Did you ever see him any time when the house was being built? A. I have seen him on one occasion; he came there one morning when the house was in course of construction, and he said he wanted some lime for a chicken coop, that he wanted to whitewash the chicken coop, and when I would have the house finished he might buy it. 10

Q. Did you see him again at that place? A. No, sir.

Q. Do you know Mr. Halt Haber? A. Yes, sir.

Q. Mr. Haber is a real estate man? A. Yes, sir, agent.

Q. Did he approach you in relation to an exchange of these properties? A. Yes, sir. 20

Q. When was that? A. One day he came to me and he said that Mr. Muller would like to exchange the corner lots on Sixth Street and Park Avenue for the Fifth Street house, and I should go down with him to the butcher shop, and I went with him down to the butcher's store.

Q. When was that? A. That was about two or three weeks before we had signed the contract.

Q. Did you and Mr. Muller talk about the prices at that time? A. Yes, sir. 30

Q. And did you or didn't you agree? A. We did not agree at that time.

Q. When did you see him again? A. Then Mr. Haber came to the house, and he said that Mr. Muller had advanced \$1,000—Mr. Muller gave \$1,000 more for my property.

Q. The price had come up \$1,000? A. Yes, sir, and that I should go down and see him.

Q. Did you go down? A. Mr. Haber went down with me. 40

Q. When was that? A. That was, I believe, two or three weeks after that first conference which we had in the butcher store.

Q. Was this near Christmas? A. Yes, sir, two days before Christmas, and then that night we did not do any business, we could not agree.

10 Q. Still dickering over the price? A. Yes, sir, and Mr. Muller said that he knew that I was a man that was putting up large apartment houses, and he said I would make a big success of it, and he took out a blueprint from his drawer, and he said he was going to build on that a large apartment house, that Mr. Frank Derese gave him the sketch.

Q. What property was this? A. On that corner plot which I was supposed to take in exchange for the Fifth Street house.

20 Q. Did you look at that blueprint? A. Yes, sir, it was only in one sheet; it was only a sketch, but it showed the whole plot to be built up.

Q. Did you complete any contract that night? A. No, sir, and when I went home we could not agree on the price; the next day Mr. Halt Haber came to me to the job where I was building, and he said, "Mr. Weiss Muller wants to try and make that deal, and I will try and get it through, and if not, he might buy another house and then you will lose the sale." Then I made an appointment with Mr. Haber to go to Mr. Muller's house between 30 seven and eight in the evening.

Q. This was still before Christmas? A. Yes, sir, and then Haber said, "You will close the contract to-night"; and I have told Mr. Haber I had better try and get my attorney, so he asked me who was my attorney—

40 Mr. Weller: I object to this.

Q. Was Mr. Muller present then? A. No, sir, so Mr. Haber asked me—

Mr. Weller: I object to that.

The Court: You cannot tell it unless Mr. Muller was present.

10

Q. Well, when you and Mr. Haber started to go down there, did you have any attorney with you?
A. No, sir.

Q. Was an attorney sent for in pursuance of something that Mr. Haber said? A. Yes, sir.

Q. And who was sent for? A. He sent for his son; he said he had made arrangements to wait on 45th Street.

Q. So he sent for his son? A. Yes, sir.

Q. Where did you go that night? A. To Mr. Muller's house. 20

Q. How many of you went to the house? A. Me and Mr. Haber and the agent, and then Haber went out for his son, to get his son.

Q. Then Mr. Isador Haber came in? A. Yes, sir.

Q. Mr. Isadore Haber drew the contract which is in evidence, and the duplicate? A. Yes, sir.

Q. Do you remember what time they were completed? A. It must have been close between ten and eleven at night. 30

Q. Were they signed that night? A. Yes, sir.

Q. When these contracts were written up, did you read them? A. Yes, sir.

Q. And did you say anything about any part of them? A. When I read them and I saw "Subject to restrictions," I asked Mr. Muller what were the restrictions, and he said, "There are no restrictions

40

only you darsen't have a saloon there, and that restriction will run out in four years about a saloon.

Q. Did you see this deed to Mr. Muller from Mr. Gerber at that time? A. No, sir.

Q. Did you have any other information from any source that there were any restrictions except what
10 Mr. Muller told you? A. No, sir.

Q. Did Mr. Muller know what you were going to do with the property? A. Yes, sir.

Q. How did he know that? A. He knew that I was building at that time on Sixth Street on Palisade Avenue, a six-family house, and he knows that I build large apartment houses.

Q. Did you say anything to him? A. I was talking to him and Mrs. Muller interfered and she said, "Mr. Weiss, you will make a large success if
20 you put a large house on this here plot.

Q. When was it you saw this blueprint? A. I saw it the night before I signed the contract.

Q. When you signed the contract, you say you knew of no restrictions except that there could not be a saloon? A. Yes, sir.

Q. And it was with that understanding that you signed? A. Yes, sir, because otherwise it would not have benefitted me any—

Q. Why not? A. Because I only build large
30 houses.

Mr. Weller: I object to this; it is based on a leading question.

The Court: Objecion overruled.

Mr. Weller: Objecion withdrawn.

Q. Mr. Weiss, was anything said at this time as to the size of the lots which were to be conveyed to you by Mr. Muller or Mrs. Muller? A. Yes, sir.
40

Q. And by whom? A. By Mr. Muller; I have asked Mr. Muller what is the size of those lots.

Q. When was that? A. That was at the time when we were talking about that, at the time that Mr. Haber was writing the contract, and I asked him "What is the size of the lots?" and he said "The corner is 30 by 95, and the three lots next to it is 25 feet front and 100 feet in depth"; then I asked him, when he told me he had that blueprint, if he ever started to get an estimate on taking the rock out, and he said he got figures from two Italians for \$1500. 10

Mr. Weller: I object to all of this as immaterial.

Mr. McDermott: Your Honor will remember that Mr. Haber states that objection was made because this excavation was going to cost a great deal more than Mr. Muller had said; now, if we were suing on a strict contract, I should say we would have some trouble about that, about proving it, because it may have been a mere expression of opinion, or, as I understand, it was not that, but that he had had a contract with somebody else to do it for ten or fifteen hundred dollars; but I believe we have a right to put that in in a case of specific performance. 20 30

The Court. I will admit it.

Q. When was the conversation to which you have referred about the excavation or the cost of the excavation? A. That was at the time when I was talking (and Mr. and Mrs. Muller were in that same conversation), about putting up a large apartment house, because there was a lot of rock. 40

Q. That was some days before the contract was signed? A. No, sir, that was the same night when Mr. Haber was writing the contract.

Q. And what did they say about this excavation?

A. He said that he had a figure—

10 Q. Who said? A. Mr. Muller said that he had an estimate from two Italians for \$1500; so I said, "I will be willing to spend \$2500, if I can get the rock out."

Q. After that, did you find out what you could get it out for? A. Yes, sir.

Mr. Weller: That is absolutely immaterial.

The Court: Objection overruled.

20 Mr. Weller: A great many people will take out a cellar for nothing, if you give them the blocks.

The Court: It is quite material.

Q. How did you find out it would cost \$4500?

A. I have asked a number of contractors.

The Court: I will let this man tell what he found out about that. I will note Mr. Weller's objection to it.

30

A. I have asked Mr. Horning, and I have asked Rob Emmer, and I have asked Joe Rossett.

Q. Who are they? A. They are contractors; they make streets and take out cellars, etc., and they told me at that time.

Mr. Weller: I object to what they told you.

40

Q. What figures did they give you?

Mr. Weller: I object to what figures they gave him.

The Court: Objection overruled.

A. Rob Emmer told me it would cost between \$4,500 and \$5,000; and Joe Rossett, a little over \$4,000; and Horning said he would have to measure it out first but it would cost every bit between four and five thousand dollars. 10

Q. Mr. Weiss do you remember when the title was to be passed for this property? A. Yes, sir.

Q. When was that? A. I believe it was supposed to be passed on the 31st of December.

Q. Were you present any time— A. The 31st of January—I remember it was the 31st of January. 20

Q. Before that time, did you employ someone to make up the search for you? A. Yes, sir.

Q. This contract was signed on the 23rd of December, 1915? A. Yes, sir.

Q. And the deeds were to be delivered and executed on or before January 31? A. Yes, sir.

Q. Did you employ a lawyer to look up the record for you? A. Well, I had employed Mr. Haber to draw up the contract, and I was going to get him to look after the records, to do the searching, and the next day after I had signed the contract I met Mr. Gordon, the Vice-President of the Weehawken Trust Company—I found out that the lots were not the size that they were sold as, so I kind of did not have much confidence in Mr. Haber, so I sent my brother to Mr. Haber's office for the deed, and I told him not to bother with the search, that I would get another attorney to do 30
40

that; so I instructed the firm of Dippel and Davis to do the search for me.

10 Q. How soon did you get a report from Dippel and Davis? A. I did not get a report on account of the restrictions, until I was in Mr. Haber's office the day of closing the title, and I had my deed read and executed by the wife to give it to Mr. Muller, and when I came there, I believe Mr. and Mrs. Muller were there at that time, and so Mr. Dippel told me that he expected Mr. Davis any minute from the court house with the descriptions from the search; so when Mr. Davis came and Mr. Dippel looked up the restrictions, then Mr. Dippel said, "Mr. Weiss, there are restrictions on that property," and I said, "What are they?" and he said "You could only build a two-family frame or
20 a three-family brick"; so I said, "Mr. Muller, didn't I ask you what the restrictions were, and you said there were no restrictions, only you daresn't have a saloon on it"; I said, "Didn't you tell me that?" and he said "Yes," in the presence of Mr. Haber and Mr. Haber's father, the agent, and in the presence of Messrs. Dippel and Davis. Then I refused to make the deal, on account of the fact that those lots were absolutely useless to me with those restrictions on.

30 Q. Mr. Dippel represented you at that time? A. Yes, sir.

Q. And made objections to the passing of the title? A. Yes, sir, Mr. Dippel said to Mr. Haber, the lawyer, "How could you overlook that, you had the deed present, and how could you help telling him about these restrictions," and he said that he did not hear the conversation at all, that he was busy writing.

Q. Were you ready to deal that day if the property had been as represented? A. Yes, sir, I had stamps for the deed, and the deed and everything ready.

Q. Mr. Weiss, prior to the time fixed for closing the title, did you have any conversation with Mr. Conrad Muller about the size of the lots in the presence of Mr. Vanderbilt? A. Yes, sir.

10

Q. Where did that take place? A. Mr. Vanderbilt came down to my job where I was building, and I told him—I went down with Mr. Vanderbilt to Conrad Muller's butcher store; that was after signing the contract a few days after.

Mr. Weller: I object to this.
Objection withdrawn.

Q. How long after signing the contract? A. Probably two or three days, or it may be four days.

20

Q. Where did you and Mr. Vanderbilt find Mr. Muller? A. In his butcher store.

Q. Was anything said then? A. I asked Mr. Muller, in the presence of Mr. Vanderbilt, the size of the lots again, and he said, "The corner is 30 by 90, and next to the corner is 25 feet front and rear by 100;" and then I asked him about taking the rock out; I said, "Who were the Italians that gave you that estimate?" and he said that he did not know who they were or where they lived, only the estimate was from \$1,500 to \$2,000.

30

Cross Examination by Mr. Weller:

Q. Why did you take Mr. Vanderbilt down to Mr. Muller's place? A. Because Mr. Gordon told me they are shorter than was sold to me; then I asked Mr. Vanderbilt—he happened to be there—I said to him coming down to Mr. Muller's, "If you want to,

40

you can come along;" and he said, "Sure, I will go along;" I was going to treat him to a drink, and I asked him to come down.

Q. Now, when that contract was signed, who read it over? A. I only read it before it was signed.

10 Q. You read it over before it was signed? A. Yes, sir.

Q. And you saw with the words in the contract, that it was "about?" A. I asked Mr. Muller what that word "about" meant, and Mr. Muller said it might be a few inches more.

Q. Didn't he say to you that he did not know just how big they were, that he knew that the corner lot was 30 feet wide, and the others he did not know just how long they were; they might be 90, 92, 95 or 100? A. He never said that; no, sir.

20 Q. Now, you had examined these lots before? A. No, sir; I had passed there, but never to look at them.

Q. You had been on this ground before the contract was signed? A. No, sir.

Q. Hadn't you been there on three different occasions before the contract was signed? A. Maybe I passed with Haber there.

Q. You know Mr. Buck, don't you? A. No, sir.

30 Q. Isn't it a fact that you were there measuring the rock two weeks before the contract was signed? A. No, sir, that was twelve days after the contract was signed; I was there with Mr. Vanderbilt.

Q. You were there three times on this land? A. No, sir.

Q. Were you not there twice before the contract was signed and went in? A. No, sir.

Q. Were not you on the lots walking around looking at them before the contract was signed? A. No, sir.

Q. You don't mean to say that you signed the contract without looking at the lots at all? A. I passed there; I know the neighborhood and the location, because I was just building on Fifth Street, near the car tracks.

Q. You say you noticed that word "about" in the contract before you signed it? A. Yes, sir. 10

Q. What did Mr. Muller say to you about that? A. He said he did not know exactly to the corner, but he said he was positive it was 30 by 95, and the others were 25 by 100.

Q. He was positive of that? A. Yes, sir.

Q. And that is what he said what he meant by the word "about?" A. I asked the lawyer, and he said that that is why he put it in.

Q. What corner do you mean? A. The corner 30 by 95. 20

Q. Now, the lot right behind these lots on Sixth Street is No. 56? A. Yes, sir.

Q. You know there is a house on No. 56? A. Yes, sir.

Q. And did you know that two-family house is right upon the line? A. I don't know exactly; the only thing I was interested in was that plot that I had bought.

Q. Is not that right up to the line? A. I know there is a house on it. 30

Q. You knew the plot you were going to buy had no jog in it? A. I don't know.

Q. If one had been 95 and the other was 100, you know that would be a jog in there? A. No, sir, it sometimes happens that way.

Q. If these three had been 25 by 100— A. I am no engineer, I am a builder.

Q. You knew these three lots were 100 feet deep? A. Yes, sir.

Q. And if he told you the other one was 95 feet deep, you knew that would be a jog of five feet?

A. No, sir.

Q. They all fronted on Bull's Ferry Road, or Park Avenue, and you knew— A. I did not know; I just bought it and had that Haber there to represent me.

10

Q. Answer the question; you knew, or must have known, that if the one was 95 and the other was 100, there must have been a jog of five feet? A. I did not know it.

Q. If one was 95, and the next to it was 100, there would be a jog of five feet, wouldn't there?

A. This is the length—

Q. You know of no way that these lots, all facing on Bull's Ferry Road, that one could be 95 and the other 100 without being a jog? A. I could not say.

20

Mr. Weller then explains by the map to the Court about the jog, which the stenographer is instructed not to take down.

Q. Isn't it a fact that there is a house on No. 56—

A. Yes, sir.

Q. The lot right behind these lots on Sixth Street? A. Yes, sir.

30

Q. Isn't that house right up to the line? A. I don't know exactly; I did not get that close.

Q. Now, you are a builder? A. Yes, sir.

Q. You have excavated certain cellars? A. Yes, sir.

Q. You know what it cost yourself to have a cellar excavated? A. Yes, sir; I have never had such rock as is there.

40

Q. It is the rock that extends above the ground that you were measuring? A. Yes, sir, and I was there with Mr. Vanderbilt, and I took out my ruler.

Q. You had been there measuring before? A. No, sir.

Q. Could you tell by measuring it just about how much rock was there? A. No, sir, I would have to get an engineer to do that.

Q. When you have a cellar to excavate, you know about how much it cost to take it out— A. They take it out by the yard, or sometimes by the lump; they charge \$3.00 a yard. 10

Q. Was this all rock? A. As far as I could see the whole center of it is all rock.

Q. The only way you could tell how much rock there was around the edges was by digging down; you never dug out? A. No, sir.

Q. You know now about how much rock there is there? A. Yes, sir, contractors have told me.

Q. You could easily measure this yourself? A. No, sir. 20

Q. And you could have had somebody measure it? A. Yes, sir.

Q. You never did have any one measure it but yourself? A. Not before, because I was trapped in between the lawyer and the father, the agent—

Q. You built a house in Fifth Street? A. Yes, sir.

Q. How big are your lots there? A. 50 by 100.

Q. How big is the area you dug out for the cellar? A. 47 by 86. 30

Q. How long before you signed this contract did you have that cellar dug out? A. Probably about six months.

Q. Who dug it out? A. Peter Brunner; the top was dirt, and in the bottom was a little rock; he took it by contract.

Q. How much did he take for it? A. It stood me a little over \$300.00, and then he had to give me the rock for the foundation. 40

Q. If it had been all rock, how much would you have expected to pay? A. If it had been all rock, if I took it out by the yard, it would stand me between \$800 and \$900.

10 Q. How big a house did you contemplate building on Mr. Muller's lot? A. I told Mr. Muller I was going to use the same plan as on Sixth Street and Palisade Avenue, that is 100 by 90.

Q. Did you have the cellar dug there? A. Yes, sir.

Q. Was that all rock? A. No, sir; no rock, dirt, the cellar was partly dug out before I bought the land.

20 Q. If you had a cellar 100 by 90, you knew what it would cost to excavate it? A. I was not on top of that before I bought it; and those lots run up like a high mountain.

Q. If it cost you \$900 to excavate for that small lot on Fifth Street, you knew it would cost you more than \$1,500 to excavate Muller's lots? A. For there is 25 times as much rock—

Q. Where? A. Muller's corner.

Q. Then you knew it would cost you five times as much? A. Before I bought it I was not on top of those lots; I only was there when I went with Mr. Vanderbilt.

30 Q. Now, that time down in Mr. Dippel's office on the 21st of February, you remember being there? A. Yes, sir.

Q. Did you have your deed ready at that time? A. When Mr. Haber was present.

A. Yes, sir.

ler and his wife in Mr. Davis' office but one time?

Q. You never met Mr. Isador Haber and Mr. Mul-

Q. And that was the 21st of February? A. I don't remember the date.

Q. Did you have your deed ready at that time?

A. Yes, sir.

Q. Why did you have a deed ready? A. Well, I had the deed ready from the first time in Mr. Haber's office.

Q. Did you have the deed with you; who had the deed? A. My lawyer had it. 10

Q. Who has it now? A. I have got it.

Q. Let me see it.

Recess to 2 P. M.

After Recess.

NATHAN WEISS, resumes the witness stand. 20

Cross Examination (continued) by Mr. Weller:

Q. At the time you were negotiating to buy Mr. Muller's lots, you were also trying to get other lots in other places? A. I am always ready to buy corners.

Q. You wanted to buy a place to build? A. I had that corner in Park Avenue, and then I had some other places to build.

Q. But you wanted to buy a place to build? A. I am always in the market to buy corners. 30

Q. Do you remember a few days after this contract was signed, seeing Mr. Halt Haber on Twelfth Street, West New York? A. I don't exactly remember; probably I did see him.

Q. Isn't it a fact that you did see him there, and didn't you tell him after you had signed this contract, that you now had a better offer? A. No, sir, he is telling a lie. 40

Q. Didn't you show him a typewritten letter and say you had got a better offer and you would be willing to give Mrs. Muller \$200.00 to cancel this contract? A. No, sir, he is a liar if he says that.

10 Q. Wasn't the letter from a banker and didn't it refer to lots on 12th Street? A. That was before Muller had bought that place, before Muller bought the Fifth Street house, and Haber was after me, the lawyer's father, he was after me and he said, "Mr. Weiss, why don't you let me make a sale"; and I showed him a letter and I said, "I have received a letter from Mr. Everett from the bank, saying that I should come down, that he might have some business with me."

20 Q. You remember going to Mrs. Muller and offering her some money to cancel the contract? A. I was there once, and I found out about the rock and about the shortage of the property, and I said, "Mrs. Muller, I would rather pay the expense, whatever it cost you, because the lots are not the size that was told to me, and the excavating will cost a good deal more than it was told to me."

Q. You remember when you were in Mr. Haber's office on the 21st of February? A. Yes, sir.

30 Q. Do you remember saying if he would make the allowance \$500 more for your house, that you would change? A. For the shortage of the property, yes, sir, if she gave the allowance, but that was before I knew restrictions were on it.

Q. But this was the 21st of February? A. Yes, sir.

Q. And you had rejected the property on account of the restrictions, on the 21st of February— A. I was only in Haber's office once.

40 Q. I said, in Dippel and Davis' office on the 21st of February, isn't it a fact that in Dippel and

Davis' office, you agreed, if they would allow you \$500, to let it go through? A. I said if they could get the release from the restrictions from that property, and they would make an allowance for the shortage of the property of \$500, I would be willing to carry out the deal; that is it.

Q. You were willing to take it if they would get releases from the whole neighborhood? A. Yes, sir. 10

Q. You knew at that time, through your counsel, you knew that Mr. Gerber reserved the rights in all those deeds not to restrict Park Avenue, except as to manufactories? A. I only knew that Mr. Gerber could only release his own rights—

Q. But you knew in the deeds he had given to other people that he had reserved the right of not putting restrictions on Park Avenue lots, excepting for manufacturing? A. The only thing I knew was about those lots that I was interested in. 20

Q. At that time there was a release from Mr. Gerber, wasn't there? A. I don't remember; I remember once that I was told that Mr. Gerber released.

Q. You did not want to put up any manufactory? A. Whatever comes along, if there is a big demand for garages, I put whatever was best.

Q. What you bought it for was to put up an apartment house? A. At that time, yes, sir, an apartment house or a factory. 30

Q. You never put up a factory in your life? A. No, sir.

Q. Now, you lived near this lot? A. No, sir.

Q. I mean the house you were building was near it? A. About two and a half blocks away.

Q. How often did you pass these lots? A. Maybe three times a week, maybe once in a month, and maybe once in two months. 40

Q. You saw the lots? A. Yes, sir.

Q. You knew how Bull's Ferry Road ran? A. Yes, sir.

Q. And you could see those lots? A. Yes, sir.

Q. And you could see the rocks sticking out above the ground? A. Yes, sir.

10 Q. Didn't you say when you went over to Mrs. Muller to get her to be reasonable on this contract, "Now, you don't know what the house is that I am selling you; it has a bad roof, and it is likely to fall down any time and you had better take \$100 and cancel this contract, and if you don't you will be sorry for it?" A. No, sir, I said to her, "There was an awful storm and the storm took off the skylight," and I was man enough to replace the brand new skylight; I told her whatever I agreed to sell her she would have.

20 Q. That you would put in a brand new skylight? A. The storm took the skylight off.

Q. How long was that after the contract was signed? A. The next day, and I got a man to put up the skylight, and I told her that I had had a new skylight put up.

Q. When was it that he took this blueprint from the bureau drawer and showed it to you? A. The day before the contract was signed.

30 Q. Is this the blueprint? A. Well, I don't exactly remember as it was this, but it was a blueprint as big as this.

Q. That shows a big apartment house? A. Yes, sir.

Q. How long before that did Mr. Muller tell you he had it drawn? A. He told me that he had got that from Mr. Dorese.

Q. Now, just tell us once more what Mr. Muller said about the size of those lots. A. Mr. Muller

said, when I saw in the contract "about" I said, "What is there 'about?'" he said, "The corner lot is 30 by 95, and the three inside lots are 25 feet front, 25 feet rear, 100 feet depth."

Q. The road runs there in a slant? A. I don't know how the road runs.

Q. You have been up and down the road many times? A. Yes, sir. 10

Q. And almost all these lots on Sixth Street, on both sides of Sixth Street, are built on? A. No, sir, there is a lot of vacant lots.

Q. A great many of them are built upon? A. Towards Union Hill, but not right in that section.

Q. He said the word "about" was put in because the corner lot was 95 by 30, and the others were 25 by 100 feet, that is the reason he put in "about?" A. Yes, sir. 20

Q. Didn't Mr. Muller say that Park Avenue slanted there, and he did not know just exactly how long they were? A. No, sir.

Q. You never paid Mr. Isidor Haber for acting for you? A. He did not send me a bill.

Q. You did not pay him for drawing up his half of the contract? A. No, sir, he did not send me the bill; if he had sent me the bill I should have paid him.

Q. What was it Muller said to you about these restrictions? A. When I read it in the contract, "Subject to restrictions," I asked him what they were, and he said, "There are no restrictions except that you daresn't put a saloon up." 30

Q. They didn't have the deed there at that time? A. Lawyer Haber had it.

Q. Did you know he had it there? A. Yes, sir.

Q. How many properties did you ever buy? Only one or two, didn't you? A. A number of them. 40

Q. You didn't look at this deed? A. I had a lawyer there to represent me.

Q. You didn't look at the deed, did you? A. No, sir.

10 Q. You didn't look at it at all? A. I tried to get the deed, and Haber said, "I am too busy writing the contract."

Q. Now, where was it you said they asked Mr. Haber, what was said; where was Mr. Haber when somebody asked him what was said and the signing of the contract; you testified a while ago that he said he did not hear the consersation? A. He said it in his own office.

Q. When? A. At the time when me and Mr. Dippel were there to settle the house.

20 Q. That was the first of February? A. I was only once in Mr. Haber's office.

Q. On or about the first of February? A. I don't remember the date, but it was the time when I was in Mr. Haber's office.

Q. How big a room was this in Mr. Haber's office where the contract was signed? A. It was in the dining-room, probably 10 by 12, or 9 by 12, something like that.

30 Q. You say after you signed the contract you went down and asked Mr. Muller the size of the lots? A. I had asked him before I signed the contract; and then two days after I went down and asked him again.

Q. Why did you ask him again? A. Because Mr. Gordon told me the lots were shorter than were sold to me.

Q. Did you look at the maps in his office? A. No, sir, I met him at the bank.

40 Q. Do you remember before signing this contract, having an estimate made about excavating these rocks? A. No, sir, I never did.

Q. Do you remember Mr. Halt Haber meeting you up where you were building the house on Palisade Avenue, and isn't it a fact that you told him that you had had an estimate made of what the cost to excavate would be, and you were told it would cost between four and five thousand dollars—about \$4,500? A. Yes, sir.

10

Q. You told him that? A. Yes, sir, between four and five thousand dollars.

Re-direct Examination by Mr. McDermott:

Q. Mr. Weiss, when was this you had this talk just mentioned with Mr. Halt Haber? A. About what?

Q. The one that you just spoke about? A. That was after signing the contract.

20

Q. The last thing that you testified to just a moment ago, was a conversation with Mr. Halt Haber, in which you stated, as I understood you, that you had had an estimate made and found out what it would cost to remove the rock? A. That was after we had signed the contract.

Q. How long after you signed the contract? A. Probably two weeks or three weeks, something like that.

Mr. McDermott: May we have this plan offered?

30

Mr. Weller: Surely.

Mr. McDermott: We would like to have it marked.

Marked "Exhibit C 3."

Mr. McDermott: May we have the map offered also?

Mr. Weller: Surely.

Marked "Exhibit C 4."

40

Re-cross Examination by Mr. Weller:

Q. Now, you did not know that these restrictions were on there until the 21st of February, when you met in Mr. Dippel's office; that is right, isn't it?

A. Yes, sir.

10 Q. You never had heard of the restrictions until that time? A. Yes, sir.

Q. All you had heard about was the shortage?

A. The shortage and about the excavating.

Q. You did not hear Mr. Dippel up in Mr. Haber's office on the first of February object to the title on the ground of these restrictions? A. This is the time I found it out, when Mr. Davis brought the search with him.

Q. That was in Mr. Haber's office? A. Yes, sir.

20 Q. But now, on the 21st of February, in Dippel & Davis' office, you offered if Mrs. Muller would allow you \$500, to let the deal go through, didn't you? A. I said to Mrs. Muller if she would get the consent of the whole neighborhood that had property on that property, releases that they would allow me to build a big apartment house, and she would allow me \$500 for the shortage, I would carry the deal through.

30 Q. What objections were there to the title at that time? A. Mr. Haber said that Gerber's deed was enough.

Q. And did not Mr. Dippel tell you that that was enough? A. No, sir.

Q. What three grounds did he object to the title on on that day, the 21st of February? A. I don't exactly remember, I left it all to counsel; the main thing which I did say was, that there are restrictions on that property.

40 Q. If you could have put up an apartment house you would have taken it? A. Yes, sir.

Henry Hope Vanderbilt—Direct Examination.

Re-direct Examination by Mr. McDermott:

Q. And if you had had the allowance which you have mentioned, too? A. Yes, sir.

Q. If they should get releases from all the people, then you are willing to carry out the contract? A. Yes, sir.

10

HENRY HOPE VANDERBILT, sworn in behalf of the defendants, testified as follows:

Direct Examination by Mr. McDermott:

Q. Where do you live and what is your business? A. 43 Eldorado Place, Weehawken.

Q. What is your business? A. Sand and cement.

20

Q. Do you know Mr. Nathan Weiss who was on the witness stand? A. Yes, sir.

Q. And you know Mr. Conrad Muller who was on the witness stand there this morning? A. I know him now; I only met him once previous.

Q. Do you remember an occasion in the early part of the year when you went with Mr. Nathan Weiss to Mr. Muller's place of business? A. Yes, sir.

Q. Can you give the date? A. January 7th.

30

By the Court:

Q. What year? A. 1916.

(Further Direct):

Q. State what took place at that time, Mr. Vanderbilt. A. I met Mr. Weiss, and he asked me if I would take a little walk with him down to Mr.

40

Muller's; there, in my presence, he asked Mr. Muller the size of these lots; he said the corner lot was 30 by 95.

Mr. Weller: I object to this, because it took place after the signing of the contract.

10

The Court: I will allow it.

Q. Who made this statement about the size of the lots? - A. Mr. Muller, that gentleman there.

Q. What did he say? A. Half the conversation was in German and half was in English, but he told him that the outside lot was 30 by 95, and the inside lots were 25 by 100.

Q. Did Mr. Muller have any conversation about the cost of excavation of the property with Mr. Weiss? A. Yes, sir, Mr. Muller told him that he had received from two Italian contractors an offer, but he did not know the names of the parties—

20

Mr. Weller: Objected to; I want the record straight.

The Court: Objection overruled.

A. Mr. Muller said that he had received a bid from two Italian contractors, but he could not recall their names, a price from \$1500 to \$2,000, to take out the stone 3½ feet below the curb.

30

By Mr. Weller:

Q. How deep below the curb? A. 3½ feet below the curb.

Q. Were you ever on this property with Mr. Weiss to make some measurements? A. Yes, sir.

Q. What did Mr. Weiss do in the way of measurement at that time? A. We went from this

40

Henry Hope Vanderbilt—Cross Examination.

gentleman's store to the property, walked over, saw the size of the stone, the height of it—

Q. What did those stones look like? A. It is ordinary building rock.

Q. You mean solid rock? A. The majority is solid, yes, sir, and he took out a rule and measured one part, and it was about on an average six feet above the curb all the way around; it was about four feet above the curb, and standing on one particular spot you would cast your eye out and get an average height of what we thought was about six feet. 10

Q. Did you make any measurement of the lot—dimensions of the lot? A. That I don't recall.

Cross Examination by Mr. Weller:

Q. Mr. Vanderbilt, you knew what you were going there with him for? A. Not the first time, no. 20

Q. You were there more than once with him? A. No, sir.

Q. What do you mean, then, by saying "Not at the first time"? A. Not the first time I went there—

Q. You only went once? A. Yes, sir.

Q. What do you mean, then, by saying, "Not the first time"? A. The first and only time I went there, I mean. 30

Q. You say that Mr. Muller told him that he had received a bid from two Italians who agreed to take it out for from \$1500 to \$3,000? A. Yes, sir.

Q. Did he say when that was? A. No, sir.

Q. Did Mr. Weiss ask him how long ago it was? A. That I don't recall; some of this conversation was in German, and that I could not understand. 40

Q. The price of removing rock is much greater now than it was, isn't it? A. That I cannot tell.

Q. Do you know anything about the price of removing rock? A. No, sir.

10 Q. You say he asked Mr. Muller the size of the lots; what words did he use when he asked him that? A. He asked him the size of the lots.

Q. What did he say? A. He said 30 by 95.

Q. No, what did Weiss say? A. I cannot tell you.

Q. Just as nearly as you can. A. I am telling you; he was asking him the size of the lots.

Q. What did Mr. Weiss say, use his language. A. Some of this conversation was in German, and some in English; I am telling you in English that Mr. Weiss asked—

20 Q. What did he say? A. I don't understand you.

Q. Use the language that Mr. Weiss said. A. I am telling you what he said.

Q. No, you are not telling me. A. I cannot tell you what I don't know; I did not ask the size of the lots.

Q. How do you know that he asked, if you don't know what he said? A. I can hear in English.

Q. What did he say in English? A. The size of the lots.

30 Q. Then, Mr. Weiss just said, "The size of the lots?" Is that what you mean to say? A. What I heard, yes. He asked him the size of the lots; he said, "What are the sizes of these lots?"

Q. Now, did Mr. Muller answer in English or German? A. Part of the conversation was in English and part in German.

Q. Did Mr. Muller answer that question in English? A. Yes, sir.

40 Q. What did he say? A. He said the corner lot was 30 by 95; the inside lots were 25 feet by 100.

Q. Now, you had seen these lots before you went down there? A. No, sir, I did not; I had probably seen them in the last 35 years going up and down.

Q. Hadn't you been there with Mr. Weiss to measure the rock? A. No, sir.

Q. When did you go on? A. After we came out of the store.

10

Q. Now, the Bull's Ferry Road slants there, doesn't it? A. I presume it does.

Q. You recognize this as a map of the lots, do you, this being Sixth Street and this Bull's Ferry Road? A. That is Sixth Street.

Q. And these four lots are the lots, are they? A. I suppose so.

Q. You went on there and measured the rock on those four lots? A. Yes, sir.

Q. Now, is not there a house right in the rear of those lots? A. There is a house there somewhere.

20

Q. This road slants a little bit, doesn't it; Bull's Ferry Road slants all the way from Weehawken? A. Yes, sir.

Q. Then, as a matter of course, Lot 35 must be longer than Lot 32, is not that so? A. If there is a slant on it, sure.

Q. What part of this conversation was in German? A. That is a very difficult question to answer.

30

Q. How long were they talking there all together? A. Probably ten or fifteen minutes.

Q. Now, isn't it a fact that Mr. Muller spoke German to Mr. Weiss, and then Mr. Weiss told you what he said? A. No, sir.

Q. What is the regular charge of excavating rock? A. Well, I could not answer that.

Q. How much a yard, do you know? A. I could not tell you, for I don't know.

40

J. Philip Dippel—Direct Examination.

Q. Anyone could easily measure the amount of rock there, couldn't they? A. Yes, sir, if they got a surveyor they could measure it.

Q. You could measure it with a foot rule yourself? A. Yes, sir.

10

J. PHILIP DIPPEL, sworn in behalf of the Defendants, testified as follows:

Direct Examination by Mr. McDermott:

Q. What is your profession and where do you live? A. Attorney-at-law and Counsellor-at-law of the State of New Jersey.

20 Q. Where do you live? A. I live at 30 Fairview Terrace, West New York.

Q. Do you know Mr. Weiss and Mr. Muller and Mr. Haber, father and son? A. I know all of them.

Q. You and Mr. Haber, I understand, have gone over the records together of the deeds on this Gerber property, and will you state the result of your examination made in conjunction with Mr. Haber? A. Yes, sir.

30

Mr. McDermott: This is done to prevent all these records here—

A. (Continued) The records of the deeds—most of them contain the same restrictions in Liber 940, page 537, which is that lengthy restriction, and some, with slight exceptions are the same.

Mr. Weller: I object to that, unless you tell just exactly what deeds they are.

40

The Witness: If we leave this out of the record, I think it will be best. The deeds made by John G. Gerber and wife—

Mr. Weller: One moment,—I would like to know about those slight restrictions.

The Court: You have a right to cross-examine at the proper time. 10

Mr. McDermott: This part is done by agreement.

A. I started to say that the deeds made by John G. Gerber and wife conveying properties on the map of property of John G. Gerber, which is marked and received in evidence, "Exhibit C4," in which the same exact restrictions are contained as in the deed to Conrad Muller conveying Lots Nos. 52, 53, and 56; (this is not in evidence, I guess), recorded in Liber 940, at page 537, are as follows— 20

Mr. McDermott: The deed just referred to by the witness from John G. Gerber and wife to Conrad Muller, dated June 1, 1906, recorded in Book 940 of Deeds on pages 537, etc., offered in evidence.

Marked "Exhibit C 5."

A. (Continued)—are as follows: "Deed recorded in Liber— 30

Mr. Weller: May I make a suggestion; why not just refer to them by number?

A. (Continued) There is a general plan of restrictions with some slight exceptions.

Mr. Weller: I think we can save time by going over the deeds and showing the varia- 40

tions—right over the numbers on the map—
just going over—No. 56 contains such re-
strictions; No. 57 such restrictions—

10 A. (Continued) 51 and Lot No. 9 contain the same
restrictions; No. 70, No. 71, No. 72 contain the
same restrictions; No. 73, Nos. 69, 74, 75—

Mr. Haber: You left out Liber 889, 38 and
39.

20 A. There is the same also to Lots Nos. 38 and 39,
Lot No. 47, Lot No. 66, Lot No. 42 and No. 68, Lot
No. 43, Lot 41, Lot 64, Lot 65, Lot 76 and 77; then
comes this deed of Mr. Muller, Lot No. 52, 53 and
56; Lot No. 37, Lot No. 36, Lot No. 63, Lot No. 62,
Lot No. 61, Lot No. 44, Lot No. 59, Lot No. 60, Lot
No. 14-46—Lot No. 15; Lot No. 57, Lot No. 50; the
following deeds contain the same restrictions, with
the exception noted as follows: Lot No. 67 does not
mention attic; attic is left out; and does not men-
tion stable; those two words being left out of the re-
strictions. Lot No. 40 is the same, except the restric-
tion has not the words "upon the rear"; and also
omitting the words "other than residential pur-
poses." Lot No. 45 has the same restriction, except
30 it omits the word "attic" after the words "two-
story," and leaves out the words "and attic," and
has the words "pressed brick" instead of "frontal
pressed brick." Lot No. 45 has the same restriction,
except with the words "with attic" omitted. And
Lot No. 48 has the same restriction, except omitting
the words, "with attic." Lot No. 73 was originally
conveyed by deed of Gerber to Hammond, recorded
in Liber 858, page 379, and contains a lengthy de-
scription somewhat different than the restriction in
40 the Muller deed. If you want me to do so, I will read

it. This lot was subsequently conveyed by Gerber to Hammond by a second deed recorded in Liber 886, page 356. In the second deed of Gerber, the restriction is exactly the same as in the Muller deed of Liber 940, page 537.

Q. How did Mr. Gerber get the lot back from Mr. Hammond? A. I don't know. Lots No. 1, 2, 3, 4, 5, 6, 7 and 8 contain the following restrictions: "And the said party of the second part, for itself, its successors and assigns, covenants with the said John G. Gerber, his heirs and assigns, that it will not use or permit to be used the premises conveyed for manufacturing purposes, which covenant is to run with the land until May 1, 1920." 10

By Mr. Weller :

Q. And does not contain the other restrictions? A. No, sir, it does not. 20

Q. Those lots 1, 2, 3, 4, 5, 6, 7 and 8 are on Bull's Ferry Road? A. Yes, sir.

Q. Right opposite the Muller property? A. Yes, sir.

By the Court :

Q. Is Gerber the original grantor of all these deeds? A. Yes, sir. Lot No. 58 was conveyed without any restrictions at all. 30

Further Direct :

Q. What is the date of that conveyance 58? A. There apparently is no date, but it was recorded May 19, 1908, and the date is left blank. The deed to Anna Muller of Lots 54 and 55, I believe that is to be put in evidence, it contains a restriction, but 40

not the same one, about manufacturing, "that she will use said premises for dwelling and store purposes, for the sale of merchandise generally, but not for manufacturing purposes" to run until May 1, 1920.

10 Mr. Weller: I offer this deed, marked Exhibit "C 6."

The Witness: I think that covers all the deeds.

By Mr. Weller:

Q. What about Lots Nos. 10, 11, 12, 13 and 16?

A. They probably are still owned by Mr. Gerber.

20 Q. No. 26 to No. 33, inclusive, are they still in Mr. Gerber, are the titles to those lots all in him yet? A. I believe so.

Further Direct:

Q. Does that cover the restrictions? A. Yes, sir.

Q. Mr. Dippel, I understand you had nothing to do with the making of this contract? A. I did not.

Q. When was it first brought to your attention?

30 A. It was after the contract had been signed, and, to the best of my recollection, it must have been at least a week or ten days later when we were requested to make a search of the title.

Q. In whose interest did you make the search?

A. Nathan Weiss.

Q. Did you also prepare the deed that would be prepared on his part? A. I did, there was only one deed to be prepared.

40 Q. Do you remember what date was fixed for the closing of the title? A. The contract fixed the date as the 31st of January, 1916.

Q. And did anything happen that day at all? A. I am quite certain that the closing of title was postponed until the first day of February, by consent.

Q. And was there a gathering of the parties on the first of February? A. On the first of February, Mr. Weiss and I went to the office of Mr. Isador Haber, and Mr. and Mrs. Muller and Mr. Halt Haber were there, as well as Mr. Isador Haber, and after being there a while, I was waiting for Mr. Davis, my partner, to return from the court house with the search notes, and we were there a while when Mr. Davis came. 10

Q. Did you know at that time of the restrictions on this property? A. To the best of my recollection, I did not know at the time.

Q. You knew when the search came in? A. Yes, sir. 20

Q. Did you examine the search? A. The search notes; yes, sir.

Q. Prior to that time had you prepared the deed from Mr. and Mrs. Weiss? A. Yes, sir.

Q. From Mr. and Mrs. Weiss to Anna Muller? A. That deed was prepared and ready for delivery on the date to be closed, and was with me at the time when I came to Mr. Haber's office on the first of February.

Q. It appears to bear no stamps; was anything said in relation to the stamps? A. Mr. Weiss was going to Jersey City at the time, and I instructed him to take \$15.00 worth of stamps, I think it was, obtain \$15.00 worth of revenue stamps at the office of the revenue collector in Jersey City, and to have them with him so that we could put them on the deed, and they were there at Mr. Haber's office, and we showed them to Mr. Haber in connection with the deed, but they were not cancelled and were not attached to the deed. 30 40

Q. After you had seen the search notes, what took place further as to the passing of the title; what was said and done right there in Mr. Haber's office on the first day of February? A. I called Mr. Haber's attention to the restrictions, and told him that according to what we had understood, they were different from the restrictions as represented to Mr. Weiss—as he claimed they were represented to him; and I also called his attention to the shortage in the lots as they were shown on the map and as specified in the contract, and I also told him that on account of the representations as to the cost of excavating the rock and the shortage, that Mr. Weiss would expect to be compensated for the difference in the value of the land. When the attention of Mr. Haber was called to the restrictions, I said to him that I could not understand why he did not explain what the restrictions were, as he had the deed present at the time of drawing the contract, and he had the deed at the time we were to close on February 1st, and the restrictions were lengthy and could easily have been seen, and he told me, or rather, he said, "I was busy writing the contract, and I did not hear the conversation about the restrictions; if I had heard the conversation, I would surely have read the restrictions to them."

Q. Did you say anything to Mr. Muller about these restrictions or about what had been said? A. No, sir, I had my conversation with Mr. Haber, but when the restrictions were read, and Mr. Weiss heard all the various restrictions, particularly about not having any apartment house for more than three families, he began to rave; he addressed Mr. Muller and said to him, "Didn't you tell me that there were no restrictions on the property, but that you could not have any saloon?" and Mr. Muller

said, "Yes, I did, but I did not know what the restrictions were."

Q. What else took place between them at that time, if you recall? A. The check which was tendered was rejected, because it was not a legal tender; Mr. Davis was there at the time when this conversation came up—we were ready to go almost 10 when that climax came about the restrictions; and then we left, or Mr. Haber then suggested that he would get a deed from Mr. Gerber, or endeavor to do so, to release these restrictions, and asked me if we would take title if such deed was obtained; I told him I was not prepared to pass upon that question at the time, but I was inclined to think that I should want to have a release from all the neighbors, as any one of the neighbors might stir up 20 trouble for Mr. Weiss, if he attempted to build an apartment house in violation of what seemed to be the apparent restrictions in the record.

Q. Was anything said as to this mortgage? A. The mortgage was not shown to me at that time, absolutely not.

Q. Was anything further said about the area, or have you told that? A. At that time we were arguing about who should be given an allowance, and there seemed to have been no question of what was said about the size of the lots; there was no dispute 30 about the actual conversation, but merely whether they were entitled to an allowance or not.

Q. There was a discussion of that? A. Well, they were not willing to make any allowance.

Q. Can you recall anything else that occurred after that first day of February? A. Nothing that I can think of at the present moment.

Q. When did you first see this mortgage that was attempted to be given?

Mr. Weller: I object—there was no mortgage attempted to be given.

Q. The mortgage which Mr. Haber referred to this morning, I mean? A. The first time I saw that was on February 19, at my office.

19 Q. Who had it that time? A. Mr. Haber.

Q. What was its condition as to parties at that time? A. It was signed by Anna Muller, and the certificate of acknowledgment certified only as to Anna Muller.

Q. This was on the 19th day of February? A. Yes, sir, that is the next day we got together; we had several conversations over the telephone, and I think I may have met Mr. Haber at the District Court, but the only time we got together at Mr. Haber's office was on the 19th day of February, at my office.

20 Q. Who was present at that time? A. Mr. and Mrs. Muller, Mr. Isador Haber, Mr. Weiss and myself.

Q. Will you state what took place at that time? A. I made a memorandum at the time; I will refer to that to refresh my memory: Mr. Isador Haber tendered a deed by Gerber of which I made a copy, purporting to be dated February 3, 1916, releasing to Conrad Muller Lots Nos. 52 and 53, with a recital; that deed is in evidence here, acknowledged February 3, 1916, before Isador Haber, attorney-at-law; Isador Haber also tendered a bond of Anna Muller for \$6,500, due February 1, 1919, and providing for installment payments of \$200 quarterly and interest, and with a cancelled revenue stamp on the bond. The mortgage of Anna Muller, dated February 1, 1916, acknowledged by Anna Muller alone, before Isador Haber, attorney-at-law. I made

that memorandum at the time that Mr. Haber was there in the office; I wrote it down. Warrantee deed, dated February 1, 1916, by Conrad Muller and Anna, his wife, to Nathan Weiss, conveying Lots No. 52, 53, 54 and 55, on the map of Gerber, subject to a mortgage of \$2,500, which the grantee assumed; subject to restrictions of record in the general chain of title, with stamp \$12.50, cancelled; acknowledged February 1, 1916, before Isador Haber, attorney-at-law. We then rejected the tender for the reason that there was a recital in the deed "Subject to restrictions of record in the chain of title"; that deed did not contain provision for transfer of the title to the middle of the street, because it recited that the mortgage was assumed by the grantee; that the title is subject to restrictions which are not according to the representations made at the time the contract was negotiated and signed; that the mortgage is not signed by Mr. Muller; that the deed of Gerber is not recorded, and could not release the premises from the other grantee's claim; that the deed tendered did not convey all the land mentioned in the contract and as represented by Muller and his wife, and that we demanded an allowance for the shortage.

Q. Did anything else take place on that occasion?
A. The tender was, of course, rejected, and Mr. Haber then said that he would make some corrections in that mortgage, and a few other things that I had objected to and tender performance again. There was a conversation there about how much allowance should be made for rock, but Mr. and Mrs. Muller would not make any concessions or any allowance.

Q. Was there any further tender then? A. On February 21, 1916, there was a tender made by Mr.-

10

20

30

40

Haber to me in my office; Mr. Weiss was not present.

10 Q. What was the nature of that? A. He then tendered the same deed; the deed of Muller and his wife to Weiss, containing a recital, "Subject to restrictions of record," having a clause in there giving title of the grantors to the middle of the street—having the assumption clause erased—the assumption of that mortgage—that part of the clause erased; it was in on the 19th day of February—I had not really compared the deed before that for the purpose of passing upon its competency to pass title, until the 19th day of February; and the bond and mortgage on the 21st of February was signed by Conrad Muller and Anna Muller; Mr. Weiss was not present at that time. My recollection is that
20 Mr. and Mrs. Muller were not present either.

Q. Did you accept the title? A. I rejected title again; I had no authority to accept it, anyhow. I had no real authority from Mr. Weiss to accept the title; but the same objection that had been made about the land described in the deed is not the same as is in the contract.

Cross Examination by Mr. Weller:

30 Q. You said you were an attorney and counsellor-at-law? A. Yes, sir.

Q. You are also in the real estate and building business? A. To my sorrow, I have built some houses.

Q. You are in the real estate and building business some with Mr. Weiss? A. I never had any real estate dealings with Mr. Weiss whatsoever.

Q. He never built anything for you? A. No, sir.

40

Q. When did you first become his attorney or solicitor? A. To my recollection, I never had any business dealings with Mr. Weiss, except on one occasion when he sued a client of mine, and he was represented by Mr. Carl Weitz, and I defended Mr. Lowney; subsequent to that he bought a mortgage from a client of mine, and I drew the assignment of the mortgage. 10

Q. Now, the last time, on the 21st of February, what time did you see Mr. Haber in your office that evening? A. About ten o'clock in the morning.

Q. In the morning? A. Yes, sir.

Q. Didn't you see him there late in the evening? A. That was on February 19; I saw him in the evening.

Q. What time was that? A. That must have been about five or 5:30. 20

Q. Did you go in there at that time with Mr. Weiss? A. Mr. Weiss was there by appointment; I notified Mr. Weiss that Mr. and Mrs. Muller and Mr. Haber would be there to make another tender, and I had received a message by telephone that that would take place, and Mr. Weiss was present on that occasion.

Q. Didn't you and he, on one of these occasions, come in together late? A. It may be possible on that occasion that I was busy at some court. 30

Q. Don't you recollect that on the 21st you came in with him late and it was in the evening when Mr. Haber was there? A. No, sir, that is absolutely not so.

Q. At which time did Mr. Haber have the thousand dollars cash? A. On both occasions.

Q. You say you had no right to accept the title? A. He had not authorized me to pass on it.

Q. How had you the right to reject it, then? 40

A. I did not expect to tell him that those objections were still to be maintained.

Q. Of course, Mr. Weiss was doing as you requested him to do? A. Yes, sir, he was taking my advice as to the legal effect of these—

10 Q. And your main objection was what? A. Mr. Weiss objection, of course, was that the restrictions there; acting under my advice, were different than those which he had had represented to him as the restrictions against the land; that the size of the land was not the same as that represented, or as stated in the contract; he also had the objection that the statements as to the cost of excavating the rock was far in excess of what the representation was. These were the final objections that were made.

20 Q. Were you objecting to the deed? A. Not after the corrections were made; on February 21, when the deed was tendered to me, those corrections were made, which obviated my objection.

30 Q. You wanted the other things removed, the restrictions, and wanted an allowance for the length of the lots and an allowance for the excavation; is that it? A. And wanted to have the restrictions taken off. Of course, I will say this: that the deed which was given by Mr. Haber to me on February 19th, had no second acknowledgement on it, and neither did the mortgage have a second acknowledgment on it.

40 Q. In each of those descriptions to the deeds that you have enumerated, there is a reservation on the part of Mr. Gerber, the grantor, not to restrict anything on Bull's Ferry Road, excepting as to manufacturing, isn't there? A. The deed of the lots Nos. 1, 2, 3, 4, 5, 6, 7 and 8, have no such exceptions, but has the actual restriction in there against manufacturing.

Q. But the other deeds, in the residential section, in those deeds, Mr. Gerber reserves the right to not put any restrictions in, excepting for manufacturing? A. I don't know exactly what it has.

Q. In order to get it on the record, then, those deeds contain these words: "Provided, however, that nothing herein contained, shall prevent the said John G. Gerber, his heirs, executors, administrators and assigns, from selling the lots as laid out on the map above referred to, and fronting on Bull's Ferry Road, free from above restrictions for store purposes for the sale of merchandise generally, but not for manufacturing purposes?" A. That is true, yes, sir. 10

Q. You first found out about these restrictions when? A. I found out, about probably three or four days before the date of closing— 20

Q. That is, before the first of February? A. Yes, sir.

Q. Did you tell Mr. Weiss about those restrictions at that time? A. I told him about them generally, previous to the actual closing.

Q. Previous to the first day of February— A. Previous to the hour of closing; well, about the time we were going to close; when Mr. Davis came back from the court house with the papers which were in the jacket, I said I would read him the restrictions, and when it came back from the court house we had the restriction written out in full. 30

Q. Then, Mr. Dippel, none of the lots on Bull's Ferry Road, with the exception of these two conveyed to Mrs. Muller, have any restrictions against anything, excepting manufacturing? A. That is right, excepting the other two on the corner, 53 and 54.

Q. When Mr. Haber came there, you told him your client was standing on those very things that 40

you pointed out here? A. I told him that I still found objection to the title for the reasons as stated.

10 Q. Did you ask him why he put in this word "about" in the contract? A. I don't believe I did; there was some talk about that word having been put in there for the reason that they did not know what the lots were; that was the explanation.

Q. That was the first of February? A. Yes, sir.

Q. And Mr. Weiss was there? A. Yes, sir.

Q. And he knew then just what those restrictions were? A. Yes, sir.

20 Q. In what way did you say that those restrictions differed—that is, to Mr. Weiss, and Mr. Haber, on the 21st of February; in what way did you say they differed from what Mr. Weiss had been told? A. I did not say, except that they were other than those that were represented.

Q. Did you say in what way they differed? A. No, sir, I presumed that Mr. Haber knew all about it, because on the first of February he was present when the conversation took place.

30 Q. Tell me as nearly as you can, what words you used on that day, when Mr. Davis came from the Court House and searched? A. Before Mr. Davis got there, I spoke to Mr. Haber about the restrictions, and I asked him if he had his deed there, and he said he had, and I called his attention to the restrictions I printed on that deed of Mr. Gerber to Conrad Muller, and I said to him, "How did it come that he did not tell what these restrictions were?" And he said, "Isador Haber said that he was busy at the time when they had their conversation between Weiss and Muller as to restrictions, and he did not hear it."

Q. Didn't he say that he was very busy rushing through the contract and he had not time to read the restrictions? A. No, sir, he did not.

Q. He did not say anything like that? A. No, sir, he did not.

Q. He said he did not hear what they said about restrictions? A. That is what he said. 10

Q. When? A. At the time when he was drawing the contract.

Q. You told Mr. Haber at that time that you would want to get releases from all—that is, a release from all these people that had bought lots?

A. I did not say I would want to; he asked me would I take a deed from Mr. Gerber releasing these two lots from restrictions, and I told him I was not prepared at that time to say whether I would accept such a deed or not, as I had an idea that any grantee of Gerber could enforce the restriction, or could at least make trouble for Mr. Weiss. 20

Q. You know now that under those deeds that they could not make any trouble for Mr. Weiss?

A. I don't say so.

Q. You don't know? A. I think there is a general plan or scheme.

Q. But you know that under these— A. (No answer.) 30

By the Court:

Q. How many lots have been abandoned under it? A. Ten have restrictions against manufacturing.

Q. Is there a restriction in the deed to the original grantor? A. No, sir, he made the restrictions.

Q. And they varied in terms? A. They were substantially alike; there is a very long recital in here. 40

JOSEPH DAVIS, sworn in behalf of the Defendants, testified as follows:

By the Court:

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

10 Q. Where do you reside? A. 312—34th Street, North Bergen.

Q. Do you know the parties to this litigation? A. Yes, sir.

Direct Examination by Mr. McDermott:

Q. You are a partner of Mr. Dippel? A. Yes, sir.

Q. You know Mr. Haber? A. Yes, sir.

20 Q. Mr. Davis, did you make the search against this Muller property on the Bull's Ferry Road, in the early part of the year? A. Yes, sir.

Q. And do you remember about when you completed your notes of the search? A. Some few days before the date set for the closing; it was around February, as I recall.

Q. Do you remember being at Mr. Haber's office on February 1st? A. Yes, sir.

Q. Did you have your notes there? A. Yes, sir.

30 Q. Did they disclose the restrictions which were in the deed from Mr. Gerber? A. Yes, sir.

Q. And were they read at that time? A. Yes, sir, I gave them to Mr. Dippel, who read them over.

Q. Who read them over? A. Yes, sir.

Q. To whom did he read them over? A. To those that were present, which were Mr. Weiss, and both the Mullers, Mr. Haber and his father.

Q. They were all present? A. Yes, sir.

40 Q. Did you hear Mr. Weiss say anything to Mr. Muller at that time? A. Yes, sir.

Q. What did he say? A. Mr. Weiss was quite put out when he was informed as to the restrictions.

Mr. Weller: I object to the words "quite put out."

The Court: Strike it out.

10

A. (Continued) Mr. Weiss addressed Mr. Muller when he found out that there were the restrictions, and he told him,—why did he tell him that there were no restrictions except the saloon,—and he could not explain that,—Mr. Muller could not explain that; he said he did not know of any restriction except that you could not have a saloon.

Q. Was anything else said at that time? A. Mr. Muller tried to explain himself that he did not know just what the restrictions were.

20

Q. What did he say about what he had said to Mr. Weiss? A. Well, Mr. Weiss accused him of making those remarks,—that there were no restrictions except that one could not build a saloon at the time the arrangements were made to sign the contract; and Mr. Muller did not deny that he had made such a statement.

Q. What did he say? A. He did not deny that he had made the statement.

Q. Did Mr. Muller say anything? A. No, sir, he was silent when he was accused of failing to mention those restrictions.

30

Cross Examination by Mr. Weller:

Q. Don't you know that the original deed from Gerber to Muller was there, and all these restrictions had been read before you went there with your search? A. No, sir.

Q. Did you hear Mr. Dippel testify to that a moment ago on the witness stand? A. I heard him

40

testify, yes, sir; I was at the Court House and I returned from the Court House between three and five o'clock, and met Mr. Dipple with Mr. Weiss and those parties at Mr. Haber's office, so what took place before I arrived, I don't know, but we did know before that time that there were some restrictions.

10 Q. Don't you know that the search that you brought from the Court House showed just exactly the same thing that the deed showed—the deed from Gerber to Muller? A. It would naturally have to show that.

Q. And that is all that your search did show? A. No, sir, it showed what other restrictions of other deeds which Mr. Gerber made.

20 Q. That is all that showed as to this particular deed? A. Yes, sir.

Defendant rests.

NATHAN WEISS, recalled for further cross examination, testified as follows:

Cross Examination by Mr. Weller:

30 Q. When we made application for a preliminary injunction, you made an affidavit in this case, didn't you? A. Yes, sir.

Q. You testified to this: "At the time fixed for closing the title, my attorneys called with me at the office of Mr. Isador Haber, and I refused to take title, acting on their advice, because of the restrictions and the shortage of the depth of the property? A. Yes, sir.

40

Q. That is on the first of February? A. Yes, sir.

Q. Then you did know of the restrictions at that time? A. Well, it was told to me right there, and Mr. Davis brought the search with him and I was told.

Q. You testified to this, didn't you, in that affidavit: "On the 21st of February I was at the office of my attorneys when the complainants and their attorney, Mr. Isador Haber, again tendered a deed, which recited that the premises were subject to restrictions of record, and I refused to take title, again, because the land described in the deed was not the same as the land described in the contract, and is not as represented by the complainants, and because it is subject to restrictions not the same as those represented by the complainants"; you swore to that, didn't you? A. Yes, sir.

Q. Was that true? A. Yes, sir.

REBUTTAL.

JOHN G. GERBER, sworn in rebuttal, testified as follows:

Direct Examination by Mr. Weller:

Q. Where do you live? A. No. 2 Second Street, Weehawken.

Q. You are the John G. Gerber who made the map of the property up there that has been spoken of? A. Yes, sir.

Q. Do you remember when you sold two lots to Mr. Conrad Muller and wife? A. I think it was

in May or June 6, 1906, the first sale, I think it was the first of June.

Q. Those lots were Nos. 54 and 55 on Bull's Ferry Road? A. Yes, sir.

Q. In that deed you placed the restriction against manufacturing only? A. (No answer.)

10 Q. June 1, 1906, you sold them three lots? A. Yes, sir.

Q. 52, 53 and 56? A. Yes, sir.

Q. 52 and 53 front on Bull's Ferry Road? A. Yes, sir.

Q. And 56 fronts on Sixth Street? A. Yes, sir.

Q. Now, in that deed there appears to be a general restriction; how did that get there?

20 Mr. McDermott: I object; here is a deed with restrictions—

The Witness: It ought not to be there.

30 Q. Now, explain how that happened to be. A. I sold those particular lots free and clear of restrictions; all those lots facing Bull's Ferry Road were free of restrictions. I think, through a mistake of the lawyer, Mr. Smyth, he made that blunder, he oversaw that he took the one No. 56 with the restrictions, and he put the two others, Nos. 52 and 53 with the restrictions; that was a mistake by him.

Q. Are those the only lots on the Bull's Ferry Road that contained the restrictions? A. Yes, sir.

Q. Just those two? A. No, sir, all the lots, eight lots, Nos. 1, 2, 3, 4, 5, 6, 7 and 8; and Nos. 52, 53, 54 and 55.

Q. They were free of restrictions? A. Yes, sir.

40 Q. With the exception of what? A. No exception, except "nuisance" or "manufacturing."

Mr. McDermott: I move to strike out this testimony as to the mistake in the deed which he says was made, he thinks, by one Smyth.

The Court: I will allow it to stand.

Q. When you laid out this plot, did you ever intend any restrictions on Bull's Ferry Road, except against manufacturing? 10

Mr. McDermott: Objected to.

The Court: Objection sustained.

Cross Examination by Mr. McDermott:

Q. You spoke of the restrictions on these lots on Bull's Ferry Road; they were restricted as to manufacturing, all of them? A. I cannot remember, but the restriction tells itself, it is on record. 20

Q. And what the restrictions tell in the deed is what you meant them to tell? A. Yes, sir.

WILLIAM PUCK, sworn in rebuttal, testified as follows:

Direct Examination by Mr. Weller: 30

Q. Where do you live? A. 411 Park Avenue, West New York.

Q. How far is that from Mr. Muller's property that you heard them testify to here? A. Well, across the street, and how deep his lots are, I don't know.

Q. Do you know Mr. Weiss? A. No, sir, I do now at the present time. 40

Q. How long have you known him by sight? A. Well, about the week after Christmas.

Q. Didn't you know him before Christmas? A. No, sir.

Q. By sight? A. Yes, sir.

Q. You knew him by sight before Christmas?
10 A. Yes, sir.

Q. How long before Christmas did you know him? A. Three weeks before Christmas.

Q. Where did you see him three weeks before Christmas? A. Walking around the lots there on Mr. Muller's property.

Q. How long before Christmas was the first time you saw him? A. Three weeks.

Q. How often did you see him on those lots?
A. Twice.

20 Q. Was he alone, or were there others with him on these lots? A. One time he had two more men with him, and about a week after Christmas he had another man with him.

Q. When he was there before Christmas, what was he doing on these lots? A. He was stooping over a rock; he had a stick or a ruler in his hand, about three feet long; he walked all the way around the lots.

30 Q. Were there other men with him? A. Yes, sir, two other men with him.

Q. What were they doing; did you see him do anything else? A. He was just walking around with them, and when they got to the rock in that hole they seemed to be measuring it.

Q. Did you see them dig at any time? A. They tried to dig, but they could not.

Q. What were they trying to dig with? A. A stick.

Q. You are sure that was about three weeks before Christmas? A. Yes, sir.

Q. How long before Christmas was it? A. Three weeks before Christmas I saw him, and about a week after Christmas.

Q. You don't know exactly how long it was before or after, but about that? A. Yes, sir. 10

Q. About three weeks before Christmas when you saw him; did you see him again before Christmas? A. No, sir, I did not.

Q. Do you remember Mrs. Muller introducing you to them? A. Yes, sir.

Q. When was that? A. That was the week before Christmas.

Q. Where were they at that time? A. Coming down the hill; she introduced me then—I mean, she pointed the men out to me. 20

Q. What were they down there for? A. Around the lots.

Q. Mrs. Muller was with them? A. No, sir, Mrs. Muller was at my place.

Q. When they passed your place, she introduced you? A. Yes, sir.

Cross Examination by Mr. McDermott:

Q. How many times do you say you saw him? 30
A. Three times.

Q. And when was it you were introduced to him?
A. I was not introduced to him; she only pointed him out to me as he was coming off the lots; that was about a week before Christmas.

Q. Did you have your attention called to it in any way at the time? A. No, sir, I just told Mrs. Muller: "I have seen that man on those lots before."
40

Q. Was there anyone with him at this time that you have just mentioned, before Christmas? A. Yes, sir, he had two men with him the first time, and then at the time Mrs. Muller pointed him out to me, he had a man with him then.

Q. When did she point him out to you? A. 10 That was a week before Christmas.

Q. Did you take any interest in it at all—what he was doing over there? A. No sir.

Q. You paid no attention to the date particularly, Mr. Puck; the date did not make any impression on you? A. No, sir.

Q. You think he was there with Mr. Vanderbilt on one occasion? A. Yes, sir, that stout man.

Q. You say this was some time after Christmas? A. About a week after Christmas.

Q. About the 7th of January, wasn't it, as a 20 matter of fact? A. About that, I guess.

Q. About the 7th of January? A. Yes, sir.

Q. And who were these men; do you know who the men were that were with him? A. They looked to me like Italians.

Q. What sort of weather was it that day? A. The sun was shining.

Q. And you say they were there making some 30 measurements? A. They were stooping over a rock.

Q. They were measuring the rock when Mr. Vanderbilt was there, too? A. Yes, sir.

Q. You never saw him before—Mr. Weiss? A. No, sir.

Q. You never saw him before that time? A. No, sir.

Q. And the next time you say Mrs. Muller was in your store? A. In front of my store.

Q. That was still in the winter time? A. Yes, sir.

Q. And she pointed him out to you? A. Coming down off the lots.

Q. Who was there with him then? A. He had another man with him then.

Q. Do you know who the other man was? A. 10
No, sir, the first time he had two Italians with him.

Q. Did you ever speak to Mr. Weiss? A. No, sir.

Q. You never have spoken to him? A. No, sir.

Q. And never have had your attention called to him particularly in any way? A. No, sir.

Re-direct Examination by Mr. Weller:

20

Q. What kind of business have you there? A. I had a butcher business.

Q. Is that a pretty popular place? A. Kinder.

Q. It is a very busy street, Mr. Puck, isn't it?
A. Yes, sir.

Q. Many hundreds of people there during the day? A. No, sir, I don't say many hundreds.

Q. Several hundreds, then? A. There might be 100 a day, yes sir.

Q. It is really a very busy thoroughfare? A. 30
Not very busy, no, sir.

Adjourned to a day to be fixed.

40

SECOND DAY.

October 17, 1916.

Same appearance as before noted.

10 Mr. McDermott: I move to have the witnesses excluded from the court room.

The Court: All right, if you feel that way about it.

ANNA MULLER, sworn in rebuttal, testified as follows:

Direct Examination by Mr. Weller:

20 Q. You are the wife of Conrad Muller? A. Yes, sir.

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

Q. Where do you live? A. 1093 Boulevard East, West New York, New Jersey.

Q. Do you remember the first time you saw Mr. Nathan Weiss, the defendant, or one of the defendants, in this cause? A. I saw him Tuesday night before Christmas.

30 Q. Where? A. Up in my own parlor.

Q. Whom did he come there with? A. With an old gentleman, Mr. Haber.

Q. What conversation took place there between you and your husband and Mr. Haber? A. Mr. Weiss got a house for sale, and he wanted our lots on Park Avenue, and he talked about the prices and about the lots, and Mr. Weiss wanted \$48,000 that night for his house on Fifth Street and Palisade; and then he talked about the lots and talked about
40 the business through and through.

Q. Well, state what was said. A. Well, he said he wanted \$48,000 for his house, and Mr. Muller and Mrs. Muller wanted \$15,000 for the lots; and that night we talked together, and Mr. Weiss came down to \$46,000 on his property. Mr. Weiss, Mr. Haber, me and my husband, were all together, and he came down to \$46,000; and then he talked about the price; he offered it to us for \$46,000, and after that he said, "I cannot do any dealing tonight, because this is not my price," and he went off then. 10

Q. When did you next see him? A. Then he came two days after that again.

Q. Who was with him? A. Mr. Haber and no one else—old Mr. Haber—and then they were sitting in my sitting room and we talked about coming down with the price again, and he talked about the digging out, and he said, "Well, Mr. Muller, how much will it cost you to dig out"; he said, "Well, years ago I could have it dug out for \$2,500"; then Mr. Muller said, "You will have to pay more now, because labor has gone up"; Mr. Weiss said "I know that, because the labor went up, I know we cannot dig it out for that"; he said, "I know that because I am a builder. 20

Q. Did he say what he wanted for the house? A. \$48,000. 30

Q. What was he going to do with your lots? A. He said he was going to build the building up, like he always built his buildings.

Q. What buildings? A. Just like he always built them.

Q. Like the one on Fifth Street—that was a five-story tenement house? A. And after that he talked to my husband, and I didn't say nothing no more. 40

Q. Well, what did they do? A. Then Mr. Weiss wanted to cut down the price, \$46,000 was too much, and there was an argument about the price.

Q. And they came to an agreement of \$45,000, on his property? A. Yes, sir.

Q. How much were your lots to be? A. \$15,000.

10 Q. Did you finally come to an agreement as to the amount? A. Yes, sir, that night.

Q. What was done after you came to an agreement as to the amount; what was done about sending in for someone to draw the contract? A. Well, he was satisfied with \$45,000, and he said to Mr. Muller, "Are you satisfied?" and he said "Yes"; and he said, "What lawyer will you have?" and I said, "We will take what you have got"; and he said, "Telephone to Mr. Haber", Mr. Weiss told me to telephone for Mr. Isador Haber, and the old man Haber went with me, and we telephoned for young Haber to draw up the contract; that was 20 about 10:30 in the night that we telephoned to Mr. Haber; and he was there from a little after eight o'clock in the evening.

Q. How did he get there at eight o'clock, if you did not telephone to him until ten? A. I mean that Mr. Weiss was up at ten o'clock.

30 Q. I asked you what time Mr. Haber got here? A. Half-past ten to 10:45.

Q. He came there at about a quarter to eleven? A. Yes, sir.

Q. What was done when he got there? A. Then Mr. Weiss told Mr. Haber about the property, and that he should make the papers up.

Q. And did he start to draw the papers? A. Yes, sir.

40 Q. What was said about the size of the lots, if anything? A. Mr. Weiss asked Mr. Muller, "How

deep are your lots?" and Mr. Muller said, "Mr. Weiss, I do not know, they run from 90 to 95 in the corner, and 33 feet front"; and Mr. Weiss asked if it was not 100 by 100 feet; and Mr. Muller said, "How could that be 100 by 100 if Park Avenue cuts off to a slant?"

Q. Did you hear anything said about restrictions? A. Yes, sir; Mr. Weiss said to Mr. Muller, "There are no restrictions," and Mr. Muller said, "I know nothing about restrictions; I only heard a few years ago that we did not dare to build a liquor store there"; and he said, "I don't care; I don't put no stores in the property." 10

Q. Did your husband tell him at that time that there were no restrictions on? A. Yes, sir; Mr. Muller said, "Mr. Weiss, I don't know anything about restrictions"; he always said that. "I only heard a few years ago that there shall not be any saloon." 20

Q. Who was your lawyer when you bought the lots, who was your lawyer? A. Mr. Smyth.

Q. Where? A. Old man Smyth, of Union Hill.

Q. Did you have a New York lawyer at that time? A. No, sir.

Q. Well, after that, did you have a New York lawyer? A. Mr. Muller bought the lots through Mr. Gerber. 30

Q. Through whom? A. Through Mr. Wall.

Q. Where is he? A. He is not here any more.

Q. Where does he live? A. He had an office on 54th Street and 8th Avenue, New York.

Q. He had an office on 54th Street and 8th Avenue? A. Yes, sir.

Q. And do you know whether or not he had the deeds? A. Mr. Wall had the deeds in the safe, because we were in Europe, and we left it to Mr. 40

Wall because he handled all our papers, and Mr. Muller never had the papers in the house until Mr. Weiss called concerning this deed.

Q. Can your husband read very much English?

A. He can read more than I do; he can read a little bit, not much.

10 Q. Was the contract signed that night? A. Yes, sir.

Q. What time did Mr. Haber get these deeds drawn, this contract? A. It was nearly twelve o'clock.

Q. And after the contract had been finished, what was done? A. Well, after the contract was finished, Mr. Weiss and Mr. Muller took one contract and read it together in their two hands, like this (indicating); Mr. Weiss and Mr. Muller held
20 one contract in one hand, and young Mr. Haber he read it over for me, because I cannot read English; and my husband and Mr. Weiss read one together, and then Mr. Haber said, "Is everything all right?" and Mr. Weiss said "Yes"; so then he asked me, "Are you satisfied?" and I said "Yes"; so Mr. Haber left at 12 o'clock with Mr. Weiss.

Q. You signed the contract then? A. Yes, sir.

Q. And he left the house? A. Yes, sir.

Q. Now, on the first of February, did you go to
30 Mr. Haber's office? A. Yes, sir.

Q. Whom did you see there? A. Mr. Dippel and Mr. Haber, and Mr. Haber's father, and me and my husband.

Q. What time of day was that? A. That was in the morning at ten o'clock.

Q. Was it in the morning or in the afternoon, or don't you know? A. I think it was in the morning; it was in the morning at ten o'clock.

Q. Do you remember Mr. Davis coming there after you had been there a while? A. Yes, sir; Mr. Davis came when we had nearly finished.

Q. What time did Mr. Davis get there? A. It was nearly 11 o'clock.

Q. Well, before Mr. Davis came there, what talk did you hear? A. Well, Mr. Dippel asked Mr. Muller if he allowed on our lots \$500. 10

Q. What did they talk about first? A. Well, that they could not close up the deal, because there was some restriction on it, and then Mr. Haber asked him what kind of restrictions are on it; so Mr. Dippel told Mr. Haber that he did not know, and after that Mr. Dippel said to Mr. Muller, "Before we go any further, do you allow \$500 on your lots?" and my husband said, "Not five cents."

Q. What took place when Mr. Davis came in? A. Then Mr. Dippel said to Mr. Davis, he said, "We cannot close this deal to-day"; that is all I heard. 20

Q. Do you remember after that going with Isador Haber up to Dippel & Davis' office on Union Hill? A. Yes, sir, one night after that—Mr. Dippel refused my check.

Q. Do you know the date? A. I could not tell you the date.

Q. Well, what took place there? A. Well, I drew the check on the bank for \$1,000, and I wanted cash money, I did not want it in my house, and I asked for a certified check, and the bank man said, "This is just as good as a certified check," and when I handed it to Mr. Dippel he said, "Do you know this check is good?" and I said, "Why not?" I said "It is from the Hoboken Trust Company." 30

Q. Where did you have that certified check? A. At home. 40

Q. Where did you have it the first time? A. In my pocketbook in Mr. Haber's office.

Q. I was not asking you at all about that; I was asking you at the time that you and Mr. Haber were at Mr. Davis' office; you went to Dippel & Davis' office? A. Yes, sir.

10 Q. Did you see Mr. Weiss there? A. Yes, sir; he sat alongside of me.

Q. Did you offer the thousand dollars? A. Yes, sir.

Q. And the deed? A. Yes, sir.

Q. And what else? A. All the papers, and he said, "Well, I don't know; I shall have to ask Mr. Dippel first about that"; and he went in and asked Mr. Dippel, and he told Mr. Haber something about the papers that I could not understand, because I
20 did not understand English very well.

Q. Was anything said about taking anything off at that time? A. \$500.

Q. Who said that? A. Mr. Dippel.

Q. Mr. Muller said "Not five cents"? A. Yes, sir.

Q. What did Mr. Dippel say about the \$500? A. He said, "Mr. Muller, are not you allowing on your lots \$500 down?" and Mr. Muller said, "Not five cents."

30 Q. Did you see Mr. Weiss after that time? A. Then after that night, first all went home; then Mr. Weiss came and offered me \$100 for my trouble; he offered me \$100 for my trouble.

Q. What did he want you to do? A. He told me I should take my lots back, and he would take his house back; I said "What kind of business do you call this?" and he said, "Don't you think \$100.00 is a good bit of money for you to make in two days?" I said, "I don't do that kind of business";

and he said, "Do you know how this house is built—the plastering is bad—the skylights fell in, and you will be very sorry"; I gave him the answer, "If the house falls in part, I will keep what I have got, and you keep what you have got"; and then after that he went away, and he said, "Come on, Mr. Haber, she is a hot-headed Dutchman; you cannot do anything with her"; this is the answer he gave me. Then he said he would go down to my husband in the store, and he went to my husband, and then after that he came again, a week after that, and he wanted \$500 from me, and I said "Not five cents." 10

Q. Now, those lots are on Park Avenue? A. Yes, sir.

Q. Is there a house on Sixth Street at the end of your lots? A. Yes, sir, a yellow house. 20

Q. Does that run right along the end of your lots? A. Yes, sir.

Q. Do you know if there is a fence running from the corner of this lot on back; do you know that or don't you? A. From that yellow house there is a garden fence running back.

Q. These are your four lots, what you call the "key lot" there is a house on? A. Yes, sir.

Q. Where is that house on lot 56? A. There it is (indicating on the map). This is the yellow house, and it has no fence here. 30

Q. Is not there a fence from the corner of the house back? A. No, sir, our line goes way back to the house.

Q. Then, from the corner of that house—that house does not cover the whole key lot; is there a fence from the corner of the house? A. No, sir.

Q. When have you been there? A. I have passed there every day. 40

Cross Examination by Mr. McDermott:

Q. This lot No. 56, what you call the key lot, you own that? A. No, sir; we sold that eight or nine years ago.

10 Q. That is the one you have been trying to tell us about, the yellow house? A. Yes, sir.

Q. How long have you and your husband owned these other lots on the Bull's Ferry Road? A. About ten years.

Q. And you go by there every day? A. Yes, sir.

Q. They are open? A. Yes, sir.

Q. Those four lots are open? A. Yes, sir.

Q. Where do you live? A. I live in 1093 Boulevard.

20 Q. How far away from those lots? A. I pass these lots on Bull's Ferry Road and go down Seventh Street.

Q. And do you go that way to your husband's shop? A. Yes, sir.

Q. And is that the way he goes to town there? A. Yes, sir.

Q. So that these lots you have a chance to see every day? A. Yes, sir.

Q. There is nothing but rock and dirt on them; there is nothing fenced in? A. No, sir.

30 Q. And you have had them for ten years, you say? A. Yes, sir.

Q. You said something about the deed, that you did not have the deed there, and Mr. Weiss asked you for it? A. No, sir; we had everything there when Mr. Weiss came.

Q. You say you had the deed there when Mr. Weiss called? A. Yes, sir.

40 Q. Where did you get it? A. I got a little tin box, and I took it out of that tin box, and I put it on my dining room table.

Q. You were there? A. Yes, sir.

Q. How long had you had it in that tin box? A. I could not tell you for how long, only two weeks before we called for it—Mr. Weiss wanted our lots—

Q. Where did you call for it? A. We had to get it from New York. 10

Q. How did it get to New York? A. My husband got it; my husband went there and got it.

Q. How did it get to New York? A. Because we left it in New York with a friend of ours when we went to Europe; we did not take our papers along when we went to Europe.

Q. When did you go to Europe? A. That is eight years ago.

Q. You say you left the papers in New York? A. Yes, sir. 20

Q. What do you keep in this tin box? A. My life insurance and all kinds of stuff.

Q. Deeds? A. This was the only deed, I think.

Q. There was more than one deed for this property; your husband went over and got the deed or deeds? A. Yes, sir, all our papers.

Q. You got them and put them in this box? A. Yes, sir.

Q. Then you had them all ready for Mr. Weiss when he came afterwards? A. I got all the papers in the box. 30

Q. And then, when they talked to you, then you got the deed and brought it out and put it on the table? A. Mr. Weiss was satisfied to close the deal.

Q. Then you got them out and put them on the table? A. Yes, sir.

Q. And then Mr. Haber took them? A. That was when Mr. Haber came.

Q. You got this deed, you say? A. Yes, sir. 40

Q. Was it one or two deeds? A. Two lots are in my name and two lots in my husband's name.

Q. You got those out and had them ready for him? A. Yes, sir.

10 Q. Did you spread them out on the table? A. No, sir, I took them out of the box and put them on the table.

Q. Can your husband read English? A. Not much.

Q. He reads some, doesn't he? A. Not much.

Q. He runs a butcher shop, doesn't he? Yes, sir.

Q. How about the books? A. My son runs the books.

Q. You got these deeds out and got them ready? A. I put them on the table?

20 Q. How could you tell which deed it was? A. Because I left it to my husband, because I cannot read English.

Q. So he pointed out which deed it was? A. I don't know.

Q. How could you pick out the right deed? Who picked it out? A. My husband; I took it out of the tin box and put it on the table.

Q. How did you know which deed it was? A. The deed was in big letters; I had no other deeds in my box.

30 Q. You had two deeds for this property in your box, and you had other deeds for other properties there? A. My husband attended to all that.

Q. Who took it out, you or your husband? A. I took it out of the tin box and put it in the table.

Q. You took how many out? A. Two.

Q. You had this insurance book? A. Yes, sir, that was all in a big paper like that.

Q. That insurance book you need every once in a while? A. Only once a year.

Q. It had been over there for eight years? A. We don't need that book, we send a check; it is a life policy.

Q. They gave you a book, didn't they? A. Yes, sir.

Q. Have you got it now? A. No, sir, I have not got it now. 10

Q. Where is it now? A. The life insurance ran out.

Q. And is paid off? A. Yes, sir.

Q. You say that they never entered anything in that book for eight years? A. No, sir.

Q. You are sure about that? A. Yes, sir.

Q. They made no entries in the book for eight years? A. I could not tell.

Mr. Weller: Objected to as not cross-examination. 20

Mr. McDermott: It all relates to this deed.

The Witness: I had the deeds in my hand—

Q. You said something about that key lot; how long ago did you sell that? A. Six or seven years ago.

Q. As long ago as that? A. Yes, sir.

Q. You had a deed for that? A. We sold that key lot before we went to Europe. 30

Q. You went to Europe eight years ago? A. Well, it is nine years this March since we went to Europe.

Q. How long is it since you sold the lot? A. I don't know, ask my husband, I could not tell you.

Q. Where was the deed for that? A. In New York.

Q. Is that one of the deeds you left there when you went to Europe? A. Yes, sir. 40

Q. You sold it before you went to Europe? A. Yes, sir.

Q. That is not over five years ago that you sold that, is it? A. I never interfere with my husband's business; I left everything to my husband; you ask me too much in your questions.

10 Q. Now, isn't it about five years ago that you sold that lot? A. No, sir, we are five years on Union Hill, and this was seven or eight years ago since we sold that lot.

Q. Do you remember when you got that deed from New York? A. No, sir, I don't remember anything about that, I had other troubles.

Q. You are sure you sent over all your deeds to this lawyer in New York? A. Yes, sir.

Q. When you went to Europe? A. Yes, sir.

20 Q. What was his name? A. Mr. Wall.

Q. And none of them ever came back to you? A. We left it to him, because he always did our business.

Q. In New York? A. Yes, sir, and over here too.

Q. I understood you to say that Mr. Weiss said he wanted to build the kind of house that he had built on Fifth Street? A. He said like he always built.

30 Q. But you said something about a house on Fifth Street? A. Mr. Weiss said to me: "You know what kind of a house I always build, like I always build," and at that time he did build the Fifth Street house.

Q. Did he say anything about the Fifth Street house? A. No, sir.

Q. Why did you know that, then? A. He built one in Fifth Street and he built one like it in Palisade.

40 Q. You say that was a five-story tenement house? A. Yes, sir.

Q. So that you knew that he wanted to build at least a five-story house on this property? A. From what he said.

Q. Did you see this blueprint before? A. I saw one, but I could not tell you exactly if it is that.

Q. Your husband had one that looked like this?
A. Made by Mr. Deriso. 10

Q. He made this plan for him? A. Yes, sir.

Q. And that was a plan for a building to go on these lots? A. Well, Mr. Weiss did not say anything about that at all.

Q. The blueprint which you know about, which you have told us about, was a blueprint for a building which was to be built on that lot? A. My husband at one time had a thing printed like this by Mr. Deriso for that corner property? A. Yes, sir.

Q. That was a valuable property? A. Yes, sir. 20

Q. I suppose you and your husband were rather proud of it? A. I don't know.

Q. You have not many other properties as large as that, have you? A. I have a house on Second Avenue, New York.

Q. But out here in Hudson you have not any other property as large as this corner plot on Bull's Ferry Road? A. No, sir.

Q. It is an important piece of property?

30

Mr. Weller: I object to that.

Q. Part of the property belonged to you? A. Two lots.

Q. Belonged to you? A. Yes, sir.

Q. How big were the two that belonged to you?
A. I really could not tell you that.

Q. Which two did belong to you—did you know that? A. I guess the two inside; I did not pay any attention to that. 40

Q. This was done pretty late at night, this contract? A. Yes, sir.

10 Q. And did you hear Mr. Weiss say anything about restrictions? A. Mr. Weiss said, "Well, Mr. Muller, do you know anything about restrictions, and Mr. Muller said, "I don't know about the re-
strictions, I heard a few years ago that there could not be any beer saloon on;" and he said, "Well, I don't care for that; I don't put any stores in the property, no saloon in the property, no stores either."

Q. So that he did not care anything about the saloon restriction? A. No, sir.

20 Q. And do you remember what was said just before Mr. Weiss spoke to your husband; do you know what was said just before that? A. Mr. Weiss asked about digging out the rocks.

Q. What was the opening when they talked about restrictions? A. Mr. Muller said to Mr. Weiss, "Mr. Weiss, I only heard a few years ago," that is all I can tell you.

Q. Was the restriction mentioned more than once? A. Twice it was mentioned.

Q. Did they talk about it again? A. They talked the very first thing.

30 Q. They talked about restrictions? A. Yes, sir, and Mr. Muller said, "I don't know about, the restriction, because only a few years ago I heard there should not be any saloon."

Q. When do you say they talked again about the restrictions? When was the next time you heard about restrictions? A. In Mr. Haber's office.

Q. That was the first of February? A. Yes, sir.

Q. Didn't you hear about it anywhere in the meantime? A. No, sir.

40 Q. You heard nothing more said about restrictions? A. No, sir.

Q. And in Mr. Haber's office there was something said about restrictions? A. Mr. Muller said, "I did not say anything about restrictions, because I don't know what restrictions are on."

Q. You say your husband said then that he did not say anything about restrictions? A. Mr. Dippel asked my husband—

10

Q. Mr. Dippel asked your husband if he had not told Mr. Weiss that there were no restrictions except the saloon, didn't he; didn't Mr. Dippel ask Mr. Muller that? A. I don't know.

Q. You heard something there? A. I could not tell you.

Q. What part of the conversation did you hear? A. When we went in Mr. Haber's office, Mr. Dippel wanted to settle this matter over, and Mr. Dippel said to Mr. Muller, "Didn't you know there was restrictions on your property?" and Mr. Muller said, "I don't know anything about restrictions."

20

Q. Then Mr. Dippel did ask him something about that, and you heard it? A. Yes, sir, I heard that in Mr. Haber's office.

Q. Now, did not Mr. Dippel ask Mr. Muller this: "Didn't you tell Mr. Weiss there were no restrictions on the property except the saloon;" did not Mr. Dippel ask Mr. Muller that in Mr. Haber's office? A. I don't know.

30

Q. You were there? A. I did not listen.

Mr. Weller: There really ought to be an interpreter for this lady.

The Witness: I don't understand the big words, you use.—

Q. So that you did not listen to what was said? A. No, sir.

40

Q. And you did not understand very well what they were talking about, anyhow, did you? A. No, sir.

Q. At this time in Mr. Haber's office, did you hear Mr. Dippel say anything about the size of the lots? A. I did not pay any attention to it.

10 Q. You did not hear him say that the lots were short? A. I did not pay any attention to it.

Q. And your idea was to leave this thing to your husband? A. Yes, sir.

Q. And you did not pay much attention to what was said? A. No, sir.

Q. Didn't you hear your husband tell Mr. Weiss the size of these lots? A. What is that?

Q. Did not Mr. Weiss ask your husband how big these lots were?

20 Mr. Weller: When?

By the Court:

Q. At any of these conversations? A. He said, "Mr. Weiss, I could not tell you exactly how they run; they go from 90 to 95 by 30 feet, being the corner.

Q. When was that, that that happened? A. That happened in my parlor when they were all together, when we were all together.

30 Q. Where was the deed then when he said that? A. It was not settled yet.

Q. When your husband said he did not know the size of the lots, where was your deed? A. In my tin box.

Q. All your husband had to do was to look at, them? A. He did not.

Q. He could tell exactly the size if he looked at the deed? A. He did not.

40 Q. He could tell exactly the size if he looked at the deed? A. He did not look at the deed.

Mr. Weller: Now, do the deeds show the size of those lots; it merely gives the number.

Q. Did you have the map there? A. No, sir; I could not tell you anything like that, because I left that to my husband; he is a business man and I am not; I left it to him.

10

CONRAD MULLER, being recalled in rebuttal, testified as follows:

Direct Examination by Mr. Weller:

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

20

Q. When did you first see Nathan Weiss in regard to the sale of his property?

Mr. McDermott: He has been over that.

Q. Well, I saw him in my store about three weeks before the sale was done.

Q. What talk did you have with him there at that time? A. Oh, we did not have much talk, only he brought the proposition to me about his house, and we talked about the lots.

Q. How much did he tell you he wanted for his house? A. \$48,000.

30

Q. Did he make any offer for your lots? A. I asked him \$15,000 for my lots?

Q. And there was nothing agreed upon then? A. No, sir.

Q. When did you next see him, about? A. Then we saw him, I think it was on Tuesday before Christmas.

Q. Christmas was on Friday? A. No, sir, Saturday, I think it was.

40

Q. Where did you see him on Tuesday before Christmas, last year? A. I saw him up in my rooms.

Q. Did he come there with anyone? A. With Mr. Hill Haber.

10 Q. And what was said there? A. Well, we were arguing about the price and so on, you know. Then we came to an agreement; well, he came down to \$46,000, and I still stood on my \$15,000, and that is the way we left that night—

Q. When did he come back again? A. Thursday night.

Q. What talk was there then? A. Well, the same argument over again about the prices, and then we agreed; I gave him \$45,000 for the house, and he gave me \$15,000 for the lots.

20 Q. About what time of night was it when this agreement was reached? A. That was really after ten o'clock, I think.

Q. And after you had reached the agreement, what was done? A. Then Mrs. Muller and Mrs. Haber went out and telephoned for young Mr. Haber to fix up the contract.

Q. And he came, did he? A. Yes, sir, he came.

Q. Go on. A. Then we made out a contract, and then we signed the contract.

30 Q. Before the contract was signed, was anything said about restrictions? A. Yes, sir, he asked me about restrictions, and I told him that I did not know anything about the restrictions at all.

Q. You told him you did not know anything about it? A. No, sir, only that I had heard that Weehawken would not allow them to put a saloon in.

40 Q. Did you tell him there were no restrictions on there? A. No, sir.

Q. After you bought this property, where were your deeds kept? A. After I bought the lots?

Q. Yes. A. I never had those deeds until about two years ago; they were kept in New York, because John B. Wall was my agent in New York, and he always did my business, and I never bothered my head about it; he collected my rents in New York, and I never bothered, and when I bought those lots Mr. Wall had them searched by Mr. Smyth and the deeds were sent over to Mr. Wall, and he kept all my papers in New York. 10

Q. What made you get the deeds back from Mr. Wall? A. Well, I had so much confidence in him that he did all my transactions, and I never bothered my head about it, because at that time I was green about property.

Q. What did you get the deeds from Mr. Wall for? A. Well, I tell you two years ago or two and a half years ago, the property that I got over there did not pay me when I had a little fire there in the house; there was a little fire in a store in a property in New York, and we had a little argument over that, and then I told Mr. Wall that I was going to collect the rent myself, and to please return my papers, and I went over and I got my papers, and he had them all in an envelope, and I left the envelope the way it was and laid them away in the closet, and they have laid there ever since. 20 30

Q. Had you ever read the restrictions up to that time? A. No, sir.

Q. Can you read English well? A. Well, I can read a little English, but I cannot understand some words and some transactions; and I trusted everything to Mr. Wall, all the transactions, and he did everything for me; that is the reason I never bothered my head about it. 40

10 Q. What was said, if anything, about the depth of these lots at that time by Mr. Weiss, at the time you were drawing this contract there? A. Oh, I told Mr. Weiss the lots were not quite 100 feet, the front, was a letter over 100 front on Bull's Ferry Road, and the depth I did not know, because Park Avenue cuts it off slanting; each lot is a little shorter or longer.

Q. What did you tell him about the width of the lots? A. Well, a little over 100 feet.

Q. The front of the four lots was a little over 100 feet? A. Yes, sir.

Q. But you did not know just exactly how much? A. No, sir.

20 Q. What did he say to you at that time or any other time about the excavation there? A. He asked me how much that would cost to excavate that, and I said, "Mr. Weiss, I don't know what that would cost; when I bought those lots I had a rough guess on it of about \$2,000 to \$2500, about; now, of course, it would cost more to dig it out on account of the war, and all the people are away;" and then Mr. Weiss said he knew that.

Q. Did he say how he knew it? A. No, sir.

30 Q. Did he say anything about being a builder? A. Sure; he said he knew it would cost more now than it would at that time, that is sure.

Q. Do you remember on the first of February going to the office of Isador Haber? A. Yes, sir.

Q. What took place there? A. We wanted to settle the house.

Q. What happened there? A. And my wife and Mr. Haber, Hill Haber, went in my office.

Q. Who was there? A. Mr. Dipple and Mr. Weiss.

Q. Go ahead and tell what happened. A. Then Mr. Dipple asked me if I would give him \$500.00, allow Mr. Weiss \$500 on my lots for excavating—

Q. What did you say? A. I said, "Not a cent;" then he brought out about the restrictions.

Q. What did he say about them? A. He said, "Well, there are restrictions on it," and that he could not close the deal. 10

Q. Who said that he could not close the deal? A. Mr. Dippel said that.

Q. Did Mr. Dippel say to you at, that time, "Mr. Muller, didn't you tell Mr. Weiss that there were no restrictions on this place, except that you could not have any saloon there?" A. He asked me, and I said, "No, I did not say that."

Q. What did you tell him you did say? A. Well, I don't know what restrictions were on them. 20

Q. You told him you did not know what the restrictions were? A. Yes, sir.

Q. And that was true, was it? A. Yes, sir.

Q. When did Mr. Davis come in there? A. About ten or 10:15.

Q. After this conversation? A. Yes, sir.

Q. Did Mr. Dippel look at anything when he spoke about the restrictions; did Mr. Dippel have the papers there? A. Yes, sir.

Q. Did he read anything about the restrictions in the deed? A. He was reading for himself. 30

Q. What did he say about those restrictions? A. He said he could not close the deal.

Q. Was that before Mr. Davis got there? A. Well, he said that before Mr. Davis came in, and then he said it again.

Q. What did he say? A. Well, he said he could not close the deal to-day.

Q. Were you up at Mr. Dippel's office in Bergen- 40

line Avenue on the 21st of February? A. Yes, sir, I was up there that night.

Q. What time of night? A. I think it was between eight and nine o'clock.

Q. What took place there that night? A. Well, we offered Mr. Weiss the money to close the deal,
10 and he did not accept the money.

Q. What did he say at that time? A. That I don't know exactly.

Q. Was anything said about an allowance at that time? A. Oh, yes, sure.

Q. What did he say about it? A. I told him I would not pay it.

Q. What did he say about it? A. I don't know.

Q. What was the substance of it? A. Well, he asked me about the allowance again.

20 Q. How much? A. \$500.00.

Q. What did he say he wanted the allowance for?
A. For excavating the lots.

Q. What did you tell him? A. Well, I said "No," I would not allow that for anything.

Cross Examination by Mr. McDermott:

Q. Did he say anything about the restrictions?
A. Not that I know of.

30 Q. At that time didn't he say, when he was talking to you, "Make the allowance \$500.00, because of the restrictions?" didn't he say that? A. Mr. Dippel said that he wanted from each owner in Sixth Street that he could build what he felt like.

Q. That he wanted a release? A. I don't understand those high words.

Q. He wanted some paper from each owner on Sixth Street, so that he could build the kind of

house he wanted to build? A. Something like that he brought out.

By the Court:

Q. He wanted a release from each owner on Sixth Street? A. Yes, sir, he wanted from each owner. 10

Further Cross:

Q. He spoke also about the shortage on the lots, didn't he, at that same time? A. I cannot say.

Q. What was that \$500 for? A. That was for excavating the lots.

Q. What about the shortage on the lots? A. He never asked anything for that. 20

Q. Don't you remember that it was said that the lots were smaller than you told him and that they wanted compensation to pay for that? A. I don't understand you.

Q. Didn't Mr. Dippel explain to you that the lots were smaller than you had said they were? A. Yes, sir, he said that.

Q. And wasn't it in connection with that that he wanted the \$500.00? A. No, sir, he wanted an allowance of \$500 for excavating. 30

Q. What did he want for the shortage on the lots; how much did he want for that? A. I don't think he asked me anything for that.

Q. He complained that the lots were not as big as you had told him? A. I sold him the lots the way they were—

Q. This map was down there in Mr. Haber's office, wasn't it, the map of the property? A. I don't know. 40

Q. You were there, were you not? A. Yes, sir, I did not look at any papers.

Q. It was your business that was being transacted; were not you paying any attention to it?

A. Not about the map; I did not see any map.

10 Q. About the size of the lots, were you not paying any attention to that? A. I sold them the way they were there; I never read the deed.

Q. You walked by them every day? A. Yes, sir.

Q. And they were the most valuable piece of property that you owned?

Mr. Weller: Objected to as incompetent, irrelevant and immaterial; it is absolutely immaterial as to how valuable it is.

The Court: Objection overruled.

20 Q. You have not any other property more valuable than that around North Hudson County? A. No, sir.

Q. It was worth \$15,000? A. Yes, sir.

Q. And you want to say now that you did not know the size of the lots? A. I did not know it.

Q. You tried to tell him the size of the lots?

A. I told him it was along 90 or 93 or 95 to the last lot.

30 The Court: How long had he owned them, how long a period.

Q. How long have you owned the lots? A. Ten years.

By the Court:

Q. And you did not know about the dimensions?

A. No, sir, I left everything to my man in New York and he had the deeds in his office.

Further Cross:

Q. The land itself was right there? A. Yes, sir.

Q. And you had seen the map many times? A. I never had the map.

Q. Did you ever take any interest in these lots at all? A. I just bought those lots through an agent; when I bought them I paid \$2,000 for the corner and \$1,500 for each lot— 10

Q. Now, do you mean to say you did not know what the dimensions were then? A. I did not; I never bought land in my life.

Q. You know Mr. Vanderbilt; he was a witness here the other day; do you remember Mr. Vanderbilt being at your place with Mr. Weiss? A. Yes, sir.

Q. Did you tell Mr. Weiss, in Mr. Vanderbilt's presence, how large these lots were? A. No, sir. 20

Q. You did not tell him? A. No, sir.

Q. Did you say anything about it? A. Yes, sir.

Q. You heard Mr. Vanderbilt here the other day; you heard his testimony? A. Yes, sir.

Q. You heard him state what you said was the size of the lots, you heard him say that? A. Yes, sir.

Q. You made a statement there— A. Mr. Weiss came in. 30

Q. Now, you say you did not tell Mr. Weiss anything about the size of the lots in Mr. Vanderbilt's presence? A. That is what I say, only I want to explain what Mr. Weiss said when he came in the store; Mr. Weiss came in the store and Mr. Vanderbilt stood in the front door, and Mr. Weiss came to the middle of the store and asked me, "How big are those last two lots, is not there 50 by 100"? Mr. Weiss asked me that.

10 Q. If they were not 50 by 100? A. Yes, sir, the two together; then I spoke in German to Mr. Weiss, and I said, "Mr. Weiss, what does that mean, what kind of scheme is that? You know in your heart and soul that Park Avenue cuts off from one lot to the other lot, it slants; You know they cannot be 50 by 100; you know how the two lots cannot be 50 by 100, as no lot is alike"; I said "You know that yourself"; I said that all in German.

Q You didn't say anything in English at all? A. When we started talking I spoke a couple of words in English; I said, "Mr. Weiss—"

Q. What did you say in English that Mr. Vanderbilt heard? A. I only talked a few words in English; I said, "Mr. Weiss, what does that mean? "you ask me such foolish questions"—

20 Q. I want to get what you said in English while Mr. Vanderbilt was there. A. Hardly anything at all. When Mr. Weiss came in, he spoke English to me, and I said, "Mr. Weiss, what does that mean?" and I said that in German.

Q. Did you say to Mr. Weiss in English while Mr. Vanderbilt was there, what was the size of the lots? A. I talked to Mr. Weiss, I told Mr. Weiss that the lots could not be 50 by 100, and then I talked in German to him.

30 Q. What did you say in English about the size of the lots? A. I stood in the store, and I said "The lots, Mr. Weiss, you know they cannot be 50 by 100"; then I said, "How can they be 50 by 100 if Park Avenue cuts off?"

Q. Was this in German? A. The first was English and the last was German.

40 Q. Now, you are perfectly sure that you did not say to Mr. Weiss, in the presence of Mr. Vanderbilt that these lots were 25 by 100, and the corner 30 by 95? A. I never said that.

Q. And all you said in English you have told us about? A. Yes, sir.

Q. Did you say anything about the excavation at that time when Mr. Vanderbilt was there? A. Nothing at all in English; we talked hardly anything at all about that.

Q. You remember what part was English and what part was German, do you? A. It is so long ago; I cannot say how long ago is it; it is nearly a year; it must be nearly a year, nine months, ten months, something like that. 10

Q. On this occasion down in Mr. Dippel's office about the first of February, wasn't it; you remember the occasion on the first of February, don't you, 1916, at Mr. Haber's office? A. Yes.

Q. You remember going down there? A. Yes, sir. 20

Q. Do you remember Mr. Dippel had a deed there for you; do you remember about that? A. Well, I did not see it; Mr. Haber had all the papers; he represented me; I saw the papers on the table, but I did not handle any papers.

Q. And something was said that day about restrictions, by Mr. Dippel; Mr. Dippel spoke about the restrictions on the first of February? A. Yes, sir.

Q. That was the day you were to close the title? A. Yes, sir. 30

Q. And Mr. Dippel said they could not close because of the restrictions? A. Yes, sir.

Q. Do you remember Mr. Davis coming in? A. Yes, sir.

Q. And then he brought some papers with him? A. He had some papers.

Q. And then they read what the restrictions were, didn't they? A. Well, Mr. Dippel was reading them; I heard what they said. 40

Q. Don't you thing restrictions are of any importance in property; you know restrictions are important? A. In some places, yes, sir.

Q. And Mr. Dippel read and told you what the restrictions were then, didn't he, after Mr. Davis came in? A. I did not get just what was in it.

10 Q. But you knew there were some restrictions?

A. He said something about the restrictions.

Q. About the property? A. Yes, sir.

Q. And it did not have anything to do with the saloon, did it? A. No, sir.

Q. You had an idea of putting up a big building there yourself once? A. I will tell you how that was.

20 Q. You did have an idea of putting up a building there? A. Another man came to me and said, "Why don't you build a big house?" and I said, "I cannot do it"; and he said, "Get a sketch made and see what you can build"; and I said, "I have enough to do"; and he said, "Get the sketch made anyway"; and I had the sketch made.

Q. How long ago was that? A. One and a half or two years ago.

Q. And that is this blueprint? A. Yes, sir.

Q. And that is the blueprint you had there when Mr. Weiss was there at the house? A. Yes, sir.

30 Q. And this blueprint was drawn for a large house? A. Yes, sir.

Q. How many stories? A. I don't know.

Q. A big house to cover the whole property? A. Yes, sir.

Q. All the way from one corner to the other, was it—this would fill up the whole property? A. I don't know about that; I did not know what to do; I did not want to build, and I had no money; I could not do anything, anyway.

40

Q. That provides for a frontage of about 100 feet, doesn't it? A. I cannot tell you about that—not on the plan.

Q. I show you this deed, Mr. Muller, from John G. Gerber and wife to Conrad Muller, dated June 1, 1906, marked "Exhibit C-5"; you remember that deed, don't you? A. Well, as I said before— 10

Q. Do you remember this deed? A. Yes, sir, in Mr. Smyth's office—

Q. In Mr. Smyth's office, or in Mr. Russ' office? A. In Mr. Smyth's office.

Q. You went over there and got this deed from him? A. No, sir, me and Mr. Wall went there and I signed the deed.

Q. Another deed, or this deed? A. (No answer).

Q. Mr. Gerber and his wife signed this? A. Yes, sir. 20

Q. You are a German? A. Yes, sir.

Q. And you have always been careful about papers, haven't you, documents, deeds, things of that kind? A. I always had them in New York.

Q. You never paid any attention to them? A. No, sir, I always left it to Mr. Wall.

Q. Did he keep your check book, too? A. He paid my expenses every month, and when the month was, over he sent me the balance, what was left. 30

Q. Who got the deed from the Register's office, do you remember about that? A. I got it from Mr. Wall about two years ago.

Q. Where did you keep it in the house? A. In my closet.

Q. In this big envelope? A. Yes, sir.

Q. Loose in the closet? A. Yes, sir.

Q. You kept them in this big envelope? A. Yes, sir.

Q. In the closet? A. Yes, sir, in the closet in the house.

Q. Where you could get them any time? A. Yes, sir.

Q. You never had the curiosity to read the deed? A. No, sir.

19 Q. Who told you that you could not have a saloon on the property? A. I heard that from people; you know how you hear those things in a store, but who told me I don't know.

Q. Whoever told you that you could not have a saloon on the property? A. It was a man, but I could not tell you his name; he told me that Weehawken would not allow any saloon on that section—

20 Q. I am talking about the restriction on the lots, who told you about that, about these lots of yours? A. What restriction?

Q. About not having any saloon; who told you about that? A. I don't know; somebody told me—

Q. What do you know about it; whom did you hear? A. Some man.

Q. He told you there were restrictions on the land you understood? A. No, sir, he said that he had heard that no saloons could be built in all that section for four or five blocks there.

30 Q. You never heard anything about these lots, any restrictions on these lots? A. No, sir.

Q. So that, so far as you knew, there were no restrictions on these lots?

Mr. Weller: I object; this is immaterial.

A. I did not know what was on it.

Mr. Weller: So far as the lot is concerned, I think it is absolutely irrelevant and immaterial.

Q. So far as you had ever discovered from an examination of your papers, there were no restrictions on these lots?

Mr. Weller: Objected to on the ground that he says he had never examined the papers.

10

Q. So far as you knew from whatever information you had about the deed itself, there were no restrictions on the property? A. I don't know anything about what was in the deed; I did not read it.

Q. So you say; so far as you knew, there were no restrictions on the property? A. I did not know what was on it.

Q. You have never known, from reading your deed, or from anything, that there were any restrictions on the property; is that so?

20

Mr. Weller: I object; this is an unfair question.

A. I did not know what was in it.

Q. So far as you knew, there were no restrictions on the property? A. I don't know what was on it; I cannot say if there were restrictions on or not.

30

Q. I say, so far as you knew, there were no restrictions on the property? A. I cannot say that.

Q. Why cannot you say that? A. Because I don't know.

Q. Did you know there were any? A. No, sir.

Q. Did you know there were any restrictions on this property, did you know there were any? A. I did not know anything whether there were restrictions on or not.

40

Q. You did not know anything about it? A. No, sir, I did not know what was on it.

Q. Did you think there were any? A. I never bothered my head about it.

Q. Did you ever look to see if there were any restrictions or not? A. No, sir.

10 Q. So far as you knew, there were no restrictions? A. Except this saloon restriction; I had heard about the saloon.

Q. So you understood there were no restrictions? A. That is not right.

Q. Did you understand there were restrictions or were not restrictions? A. I did not know what was on it.

Q. Did anyone ever tell you there were any restrictions? A. No, sir.

20 Q. So you did not believe there were any? A. I did not bother, I said I left the lots lying there where they were; I did not bother about it.

Q. You never knew there were any restrictions? A. I did not know what was on it.

Q. Don't you know what you know? A. I have said all I know.

Q. Did you know there were restrictions or did you know there were no restrictions? A. I cannot say anything else.

30 Q. Now, you made an affidavit once in this matter, didn't you; you remember making an affidavit in this cause? A. Yes, sir; I was once on the witness stand before.

Q. And you say in this affidavit, on page 1 of the affidavit and page 4 of the affidavit: "Deponent well remembers having answered Mr. Weiss, that when he bought the lots he was told he could not have a saloon on"; is that true? A. Yes, sir.

Q. Upon these lots? A. Upon that section.

Q. Who told you that? A. That was some man told me.

Q. But you remembered it well enough to tell Mr. Weiss? A. Yes, sir, but who it was, I don't know.

Q. You were told when you bought the lots, that you could not have a saloon on; did Mr. Gerber tell you that? A. No, sir. 10

Q. You had a talk with Mr. Gerber when you bought the lots? A. No, sir, I paid a deposit.

Q. This blueprint that has been shown here, you remember that; didn't you deny in your answer in this cause that you ever had a blueprint? A. No, sir.

Q. You don't remember about that? A. No, sir.

Q. I will read from your answer, replication and answer to counterclaim: "Complainants deny that during the negotiations aforesaid, the complainant, Conrad Muller, exhibited to the defendant, Nathan Weiss, a blueprint." A. There are so many words I don't understand. 20

The Court: Mr. Muller may have been misinformed.

Mr. Weller: If he was getting a blueprint for a house like that, he certainly did not know of any restrictions; he certainly would not have got any blueprint if he had known of any restrictions. 30

Q. How many times did Mr. Weiss ask you about restrictions before the contract was signed? A. I guess, the first night and the second night we spoke over it, I think.

Q. The first night and the second night? A. Yes, sir.

Q. Where did he ask you first about it? A. I think the first time was in the house, and the second time in the house.

Q. Those were the only times? A. That is all I can remember.

10 Q. How did he come to ask you about restrictions the first time in the house, what was said? A. I think he asked me if there were any restrictions on it; and I said, "Mr. Weiss, I don't know what is on it."

Q. Is that all? A. Yes, sir.

20 Q. Now, down at Mr. Haber's office the first of February, Mr. Dippel asked you what you had said to him, didn't he, and he asked you then if you had not told him there were no restrictions, except you could not have any saloon? A. No, sir, I did not say that.

Q. Did not Mr. Dippel ask you that? A. I think he did.

Q. And Mr. Dippel was there, of course, Mr. Davis was there, and Mr. Weiss was there? A. No, sir, Mr. Davis was not there at that time; I don't think he was, I am not sure.

Q. Now, do you remember what you answered? A. Well, I told him I did not know anything about the restrictions.

30

Mr. McDermott: I am through.

Mr. Weller: I want to offer in evidence the original affidavit of Nathan Weiss in this case, made on the 28th of February, 1916, and I would like to have it marked.

Marked "Exhibit Weller 1."

(This was produced by Mr. McDermott on call.)

The Court: We will adjourn now until next Monday.

40

Hearing continued
Wednesday, November 15, 1916.

SEBASTIAN MAULBECK sworn for the Complainants.

By the Vice Chancellor:

10

Q. Where do you reside? A. 927 Union Street, West Hoboken.

Q. What is your business? A. Civil engineer and surveyor.

Direct Examination by Mr. Weller:

Q. You are Town Surveyor of West Hoboken, are you? A. Yes, sir.

Q. How long have you been surveyor? A. Thirty-five years.

20

Q. You made a survey of lots 52, 53 and 55 on the map of the Gerber property in Union Hill? A. Yes, sir; Weehawken.

Q. (Showing witness). Is this the survey? A. Yes, sir.

Q. Does that truly represent the property? A. Yes, sir.

Q. I call your attention to the house on the east side, or at the east end of these four lots. Do you notice that house there? A. Yes, sir.

30

Q. And there are little crosses marked from the back end of these four lots. What are those crosses? A. That means a channel fence, iron post put in the rail.

Q. Did that appear to be an old or new fence? A. A fence about four or five years old.

Q. Did you notice the lot on the key lots here? A. Yes; there is a plain house there.

40

Q. Does that stand right up along the line of No. 55? A. No; it is ten and three-quarters here and eight and one-half in the front.

Q. Is there a fence there? A. Yes, sir.

Q. What kind of fence? A. That is a wooden fence there.

10 Q. An old or new fence? A. Well, that may be older, maybe six years.

Mr. Weller: That is all.

The Vice Chancellor: Have you any questions, Mr. McDermott?

Mr. McDermott: From the development of the testimony it would seem to me to be immaterial.

20 The Vice Chancellor: It is in now. There is no objection to it.

Mr. McDermott: I move to strike it out now. That is all.

The Vice Chancellor: I will deny the motion and let the testimony stand for consideration.

Mr. Weller: I offer the map in evidence and ask that it be marked.

(Map referred to is marked Exhibit P. 1).

30

GUSTAV LIMOUZE sworn for the complainants.

Direct Examination by Mr. Weller:

Q. Where do you reside? A. I reside at 816 Park Avenue.

Q. What business are you in now? A. In the same business.

40

Q. You were formerly in the real estate business? A. Well, partly. I was at times long ago, sometime ago. My brother conducts a real estate business.

Q. But you have been in the real estate business in that neighborhood? A. Yes, sir.

Q. You live whereabouts as to Sixth Street? Can you point out on this map? A. I live right in the center, between fifth and Sixth Streets. 10

Q. Do you know the number of the lot you live on? A. I think it is 63.

Q. Or is it 56? A. Well, I could not exactly tell you about that, because I don't remember that exactly.

Q. Which lot is it, starting at Sixth Street, walking towards the south, which lot would it be? A. (Referring to map). Is it the whole block? 20

Q. No; this is the sidewalk, this is Bull's Ferry Road, and here is Sixth street. A. I live right in the center, here (indicating).

Q. There is 52, 53, 54 and 55. You live, of course, in the house there, do you? A. I do.

Q. You know there are four vacant lots? A. Yes. Oh, hold on, I am wrong here. This is mine, right here (indicating).

Q. You live right next to the four lots? A. Yes.

Q. Is your house built pretty close to the line? A. I am ten and one-half inches from the line. 30

Q. Have you a fence running from the rear of your house back to the next lot? A. All the way back.

Q. How long have you lived in this house? A. I lived in this first house adjoining about one year after I built it, about eight years ago.

Q. Does that fence run back there ever since? A. Yes, sir.

Q. Then anyone standing there in the neighborhood could tell just how much land is vacant by looking at it, could he? A. Yes, sir.

Q. Are there restrictions on your house or not? A. No, sir.

10 Q. Do you know the neighborhood pretty well there? A. I think I do.

Q. What kind of a neighborhood is it? A. What do you mean, in what respect?

Q. Residential or business? A. Business, supposed to be.

Mr. McDermott: I move to strike that out.

The Vice Chancellor: Strike out what it is supposed to be.

20 The Witness: Well, it is at the present; it is residential and it is a business location.

Q. Well, is there business around there?

The Vice Chancellor: Are there any stores in the neighborhood?

The Witness: Not on my side. On the opposite side there is.

Q. Across the street? A. Yes.

30 Q. How many stores are there? A. Two.

Q. What are they? A. One grocer and one a butcher.

Q. Are there any apartment houses along there?

Mr. Dippel: I object. It seems to me the question should be as to the condition of the property on this map. We are not concerned with what may be the conditions in West New York, in a different part of the town.

The Vice Chancellor: He lives in Weehawken, he says.

Q. You live in Union Hill? A. Weehawken.

Mr. Dippell: The lots are in Weehawken and Mr. Limouze lives south of this map. Lot 55 is the last one on the map of Gerber, south, and Mr. Limouze's house is adjoining that, on another map, and he is speaking about the house across the street, which is in West New York. 10

Mr. Weller: What difference does it make? I want to show the character of the neighborhood.

The Vice Chancellor: You have shown it sufficiently. I do not think you need dwell any further on it. I understand about the neighborhood. 20

Cross Examination by Mr. Dippell:

Q. You say that your house is on the lot adjoining lot No. 55? A. Yes; I think my number is 63 there, because, I will tell you why—

Q. Never mind that. That is on another map, is it not? A. It is on the—

Q. What kind of a house have you got there? A. A two-story frame house. 30

Q. Flat roof or a peak roof? A. A peak roof.

Q. Do you know how much overhang there is of your roof? A. I think about eight inches; I am not positive about that, because I ain't got the specifications and plans with me. There is only a little overhang.

Q. And this overhang you think is about eight inches? A. It is only a small thing, about that big (illustrating). 40

Mr. Weller: He measures about eight inches.

The Vice Chancellor: A little less.

The Witness: When I had that drawn, I had ten inches there, so I would have plenty of room.

10 Q. Did you build after your survey or before your survey? A. After the survey.

Q. And you do not know of your own knowledge whether they built it according to the survey as marked or not? A. I do, because it was sketched out.

Q. But you did not build it, did you? A. No, but I was there when it was done.

20 Q. Do you know whether your fence is on the line or not? A. I know it is inside the line.

Q. So if this survey shows that the fence is over two inches on the adjoining lot, No. 55, it is not according to the way you understand it? A. No, sir. It might have fell over by old age. The posts are rotten.

Q. Could you tell by reference to the overhanging eaves of your house, as to the location of this fence, whether the eaves are further over than the fence or further in?

30 Mr. Weller: I object. There is nothing like that set up in the answer.

The Vice Chancellor: I will allow it to stand and note an objection to it, that it is immaterial, irrelevant or incompetent.

Last question read.

By the Vice Chancellor:

40 Q. Can you tell whether the eaves are inside the fence or not? A. No, they were inside the fence

rail, at the time the fence was put there, but they both are rotten. They are tied to Mr. Hoppe's fence now.

Q. They may be bent over? A. They are bent over. The posts are rotten.

By Mr. Dippell:

10

Q. If they were inside before they are inside now, are they not? A. No, sir, because I tied them up to Mr. Hoppe's fence with wire.

Q. According to the survey at the present time, this fence leans two inches toward the north? A. I do not know anything about the present survey.

Q. It leans two inches toward the north? A. I don't know.

Q. And your house being on the south, if you are inside the line—

20

Mr. Weller: I object to the question. It contains a statement that is untrue. It shows it leans two inches toward the south.

The Vice Chancellor: He says the eaves are inside and the fence is inside, too; that the fence is in the proper position. If I had ten inches and a half on the south, I would not put it out, naturally.

30

Q. How long have you been living in that section? A. Since I put up the house, since it was finished.

Q. How many years is that? A. About eight years.

Q. And you know the condition that this street is in as to the residences there? A. I know this street was restricted up to Bull's Ferry Road.

40

Q. That is that street there (indicating), shown on this map of the Gerber map? A. No; I know they had that restricted up to Sixth Street.

Q. And these houses up along Sixth Street are private residences? A. Yes, sir, except in Park Avenue.

10 Q. On Park Avenue, but as a matter of fact they are four vacant lots? A. Yes, and there was no restriction on those lots.

Mr. Dippell: I object to that.

The Vice Chancellor: That is his testimony.

Mr. Dippell: I object to that, that they were all vacant lots.

The Vice Chancellor: Strike it out then.

20 Q. And on Park Avenue, between Sixth Street and Seventh Street, they are all vacant lots with the exception of the small lodge house which is just back? A. Yes, the gate house.

Q. The gate house that was there many years? A. Yes, sir.

By Mr. Weller:

30 Q. Mr. Limouze, you are willing, of course, to straighten up your fence at any time if it is encroaching on anyone? A. Any time at all.

By Mr. Dippell:

Q. If your eaves are over, Mr. Limouze— A. I will cut them off, but I know that I am not over.

By Mr. McDermott:

40 Q. You will do that without an action being brought against you? A. I will do that to-morrow, if he wants me to do it.

Q. If someone demonstrates that is so? A. They have to convince me. I am only saying that I got my survey—I know that they are not over. I put in ten and one-half inches reserve, and I am positive that little eave is not over much.

Q. If you are asked to do it, you will do, when you are convinced, without making it necessary to go to court to convince you? A. Yes, sir, I will do it anytime I find I am wrong. 10

FREDERICK HOPPE, sworn for the complainants.

Direct Examination by Mr. Weller:

Q. Where do you live? A. 35 Sixth Street Weehawken. 20

Q. How long have you lived there? A. In Weehawken about seven years.

Q. How long have you lived where you live now? A. About six years.

Q. At the east end of lots 52, 53, 54 and 55 on Park Avenue, you have a house? A. Yes.

Q. What kind of a house is it, brick or wood? A. Brick house. 30

Q. You have lived in that house, how many years? A. About six years.

Q. You have a fence running from the rear end of your house back to that lot?

Mr. McDermott: Objected to as immaterial and irrelevant.

A. Yes.

The Vice Chancellor: Note the objection.

Q. How long has it been there? A. So long as the house stands.

Q. Have you noticed a fence running from Mr. Limouze's house back to that corner lot? A. Yes.

10 Q. How long has that been there? A. I do not know.

Q. How long have you noticed it there, about? A. Since I lived there.

Q. Since six years? A. Yes.

No cross examination.

20 JOHN T. WALL, sworn for the complainants.

Direct Examination by Mr. Weller:

Q. Mr. Wall, where do you live? A. 300 West 55th Street, New York City.

Q. Are you acquainted with Conrad Muller, the complainant in this cause? A. I am.

Q. How long have you done business for him? A. Ten or twelve years.

30 Q. And what was that business? A. Well, I was—I collected rents for him, managed his property in New York.

Q. Do you remember his ever leaving any deeds in your possession? A. Yes.

Q. What deeds were they? A. Deeds for 916 Second Avenue, New York, and some lots on Sixth Street or Fifth Street—Sixth Street.

Q. Weehawken? A. Weehawken, yes, sir.

Q. Did you attend to the purchase of those lots?

40

A. Well, I took them to a lawyer to have them searched.

Q. To whom did you go to? A. One Warne Smythe, 146 Bergenline Avenue.

Q. Did you have the deeds after the property was searched? A. Yes.

Q. How long did you retain those deeds? A. 10
Up till a year or a year and a half ago.

Q. Can Mr. Muller read English well?

Mr. McDermott: I object.

Q. Do you know whether those lots are restricted or not? A. On Park Avenue?

Q. Yes. A. No.

Mr. Dippell: I object to that.

The Vice-Chancellor: Well, if he does not know— 20

Mr. McDermott: What did he say?

The Vice-Chancellor: He said he did not know.

Cross Examination by Mr. McDermott:

Q. Are you an attorney? A. No, sir.

Q. What is your business? A. Real estate and insurance.

Q. And your business is an active real estate business, is it? A. For the last thirty years. 30

Q. And you say you had two deeds of Mr. Muller's in your possession? A. I had more; I had three deeds.

Q. What was the other deed for? A. A house on the Boulevard, where he resides.

Q. A house on the Boulevard, and these lots on—
A. Park Avenue.

Q. —Park Avenue and a parcel of land in New York, somewhere in New York City? A. Yes. 40

Q. How do you know these deeds cover these particular properties? A. Because when I got them back from Mr. Smythe I looked them over and put them in the safe.

10 Q. At that time you made a careful examination of them, when they came back? A. Well, I looked over them carefully.

Q. How many of the Muller deeds on this property did you see—one or more than one? A. I think there were two.

Q. You spoke of one a little while ago. Which one did you have in mind then? A. Well, first he bought two lots on Park Avenue, with the option of three more, I believe, and he took title, I believe—he bought the other three before the option was up.

20 Q. Which one did you see? A. I seen both of these.

Q. And they were brought in at the same time, of course? A. No.

Q. But you examined those carefully? A. I know Mr. Smythe was a competent lawyer.

Q. You examined them and know what property they covered? A. Yes.

Q. And, as a real estate man, you examined them with some care? A. Yes.

30 Q. I show you a deed that has been offered in evidence and marked Exhibit C-5, being a deed made by John G. Gerber and wife to Conrad Muller, dated June 1, 1906. Did you ever see that deed before? A. Yes.

Q. That is the one you saw? A. Yes.

Q. You are quite sure about that? A. Quite sure.

40 Q. And you notice that part of the printed matter had been stricken out? A. No, I did not notice that.

Q. You examined it—you were Mr. Muller's—

A. I was not his attorney.

Q. No, but you were his superintendent, as it were. You were his real estate expert? A. Not at all.

Q. What? A. I was not.

Q. You got these deeds. You say they were sent over to you? A. Yes; I put them in the safe for him. 10

Q. You had a search made against them? A. I took them to Mr. Smythe.

Q. Did you see a search? A. No.

Q. Didn't he return the search to you after you sent the deeds to him? A. No; he transacted all the business himself with Mr. Muller.

Q. And Mr. Smythe is a very careful man? A. Yes. 20

Q. And you did not see the result of the search at all? A. No, sir; I do not think I was there when it was closed.

Q. But you know a search was made? A. I took them to Mr. Smythe to search the property for him.

Q. Was that after the closing or before? A. After he got the deed back from recording he mailed it over to me.

Q. When did you have Mr. Smythe make the search? A. A couple of days after he bought the property. 30

Mr. Weller: I object to this question.

The Vice-Chancellor: You knew the state of this title, did you?

The Witness: I did not. I knew he bought these two lots and I took them to Mr. Smythe to search them.

Q. And before the title was closed Mr. Smythe had a search made? A. Certainly.

Q. And reported on the title? A. Not to me; no, sir.

Q. You are very familiar with these, are you not? A. I think so.

10 Q. And you know now, do you not, that the second page of this deed contains a number of restrictions? A. No, I did not know it.

Q. You know it now? A. I heard just what you said.

Q. Well, look at the papers. A. (Witness examines papers.)

Q. You haven't any doubt that they are restrictions, have you? A. I notice there are some restrictions there, yes, sir.

20 Q. Covering the whole second page of this deed in typewriting? A. Yes, but I don't think they belong there.

Q. I am not asking you that. There they are. A. It looks that way.

Q. And it is so drawn that they could not possibly escape the attention of a real estate man or a real estate lawyer, could they?

30 The Vice-Chancellor: If he examined them.

A. I never examined them. When he bailed them to me I put them in the safe.

Q. But you said a moment ago you did examine them and examined them carefully? A. I did not.

Mr. McDermott: The Court will remember what he said.

40 The Vice-Chancellor: Yes; I recall the witness's testimony.

Q. Don't you remember you said that a moment ago? A. I said I looked to see they were the deeds for the property, and put them with Mr. Muller's papers in the safe.

Q. And that you sent them to a good real estate lawyer to have the title searched? A. No, I did not have the deed.

10

By the Vice-Chancellor:

Q. What do you say? A. I said after he bought the property I took them to Mr. Smythe and Mr. Smythe searched the property for him and after he filed the deeds and got them back he mailed them to me and I put them in the safe with Mr. Muller's papers.

Q. You did not examine the deeds at all, then? A. Not very carefully, excepting I knew they were the deeds for those lots. I did not look for any restrictions or anything else.

20

By Mr. McDermott:

Q. Did you look to see whether there was anything on the second page or not? A. I do not think there were any restrictions on it, but I did not look for any.

Q. Do I understand you are a real estate expert?

30

A. Yes.

Q. Where did you say you kept these deeds? A. In a safe.

Q. When do you say they were turned over to you? A. Well, I am not sure whether it was 1906 or 1907. Somewheres around there.

Q. When did you say they were delivered back? A. I gave them to Mrs. Muller about a year or a year and a half ago. She came over after them.

40

Q. That was the way they were delivered? A. She came in my office and told me she wanted Mr. Muller's papers and I gave them to her.

Q. Have you anything to fix the time? A. No.

Q. It is simply a matter of memory? A. Yes. I know it is over a year ago.

10 Q. Could it be as long as two years possibly? A. Possibly it is.

Q. Three years? A. No; I do not think it is three years.

Q. Mr. Wall, I have shown you two deeds. At least, I have shown you one particularly, and I will call your attention to another deed, made by John G. Gerber and wife to Anna Muller, dated April 23, 1907. Did you ever have that deed? A. Is that for the other three lots?

20 Q. That is for two lots. I thought he bought two lots first and three afterwards.

Q. It seems to be the other way. He bought three lots first and afterwards Mrs. Muller bought two lots. You know whether you had that deed or not? A. I certainly do.

Q. How many different deeds did you have altogether? A. Well, I had that deed and the deeds for 916 Second Avenue, New York, and I think I had the deeds for his house on the Boulevard, but
30 I am not sure.

Q. Any other deeds? A. No.

Q. You are not sure about the Boulevard? A. I am not sure about the Boulevard.

Q. Did you own any land in this neighborhood yourself? A. Yes.

Q. Where were your lots? A. Oh, I had some lots on the Boulevard, some lots on Seventh Street, West New York.

Q. On this same property? A. I had some lots in Sixth Street, Weehawken.

Q. On Sixth Street? A. Yes.

Q. What lots did you have on Sixth Street? A. Well, I could not tell you now. I know we built a couple or three or four houses.

Q. Where were they? A. I could not tell you now. 10

Q. Did you get the title from Mr. Gerber? A. Yes.

Q. That property was restricted? A. In the side streets it was restricted for two-family houses.

Q. And that was the same kind of deed, with this second page all covered with typewriting? A. Yes.

Q. And you knew what those restrictions meant? A. Exactly, in Sixth Street. 20

Q. You knew what restrictions of that character set out were? A. Yes.

Q. You had a deed yourself with the same identical restrictions? A. Yes, in Sixth Street.

Q. And on your property in Sixth Street you had a deed with these same identical typewritten restrictions? A. The two-family house, yes.

Q. And yet, do you mean to say now that when Mr. Muller turned over this deed to you, with the same restrictions that were on your property, you did not notice them? A. I did not notice them. 30

Q. You really mean that, do you? A. I honestly do.

HILL HABER, sworn for the complainant.

Direct Examination by Mr. Weller:

Q. Where do you live A. I live 718 Angelic Street.

10 Q. West Hoboken or New York? A. West Hoboken.

Q. What business are you in? A. Real estate.

Q. How long have you been in the real estate business? A. Sixteen or seventeen years.

Q. You are the real estate agent that brought Mr. Muller and Mr. Weiss together, are you? A. Yes, sir.

20 Q. When did you first see Mr. Weiss? A. I saw Mr. Weiss about three weeks before Christmas, last Christmas.

Q. Three weeks before Christmas? A. About three weeks.

Q. Where did you see him? A. Up in his building.

30 Q. Did you have any talk with him? A. I told him I got four lots exchanged from this property on Park Avenue and Sixth Street, Weehawken, and he said he would like to see it and I bring him over there to the lots and show him the lots and we went all through the lots and in one was a rock and he said there was a whole lot of rocks there, and he said what the party asked for the lots, and I told him the price, and he said, "Well, we will go down, I want to see the party."

Q. The party was Mr. Muller? A. The party was Mr. Muller, and we went up to the store, and asked Mr. Muller the price and he told him the price for the lots and he asked him how wide and how deep the lots is and Mr. Muller told him the lots is in the

front over a hundred, the corner lot is about thirty, and the back is—the front thirty and up on the end the last lot is about a hundred, across Park Avenue it is a little shorter.

Q. How long did he say the shortest was? A. From ninety up until nearly a hundred. I am not sure. He said about.

10

Q. You say you went there with him and looked over this land? A. Yes; we went up around and he say to me, "Here is a lot, and here is a lot bigger, and so many feet down—quite a whole lot of money." And I said, "I don't know." And he said, "We will go and see the owner."

Q. Is there a house on the east side of these, right on the end of them, on Sixth Street? A. Yes.

Q. What kind of a house is that, brick or frame? A. I do not remember. It is two-family.

20

Q. Is there a house on the south side of Park Avenue? A. Yes.

Q. Did you notice a fence running back from the house on Sixth Street, back to the end of the lot?

A. Yes, I guess so.

Q. Did you notice the fence running from the frame house back to the end of this lot?

Mr. McDermott: This is rather a leading examination.

30

Mr. Weller: I have proved it by two witnesses.

The Vice Chancellor: I am wondering what you are proving it for if it is the same testimony.

Mr. Weller: I want to know if he noticed it.

A. On Park Avenue there is a fence.

Q. You saw that fence? A. Yes.

40

Q. Standing there on the top of the hill, can you see the whole lot as it is laid out? A. The lots around there?

Q. Yes. A. Yes.

Q. Is there a sidewalk on Park Avenue? A. Yes.

10 Q. And on Sixth Street? A. There is a sidewalk there.

Q. And standing on the top of the hill you can see all around the four lots as they lay there together? A. Yes.

Q. Now you say he talked about the various lots, the rock there, and it would cost a lot to excavate. A. Yes, he said there was lots of rocks there and he wanted to see the owner and we went to the owner and he asked how deep this lot is and he told him the lot is close to a hundred feet; the corner lot is 20 thirty and the back is ninety, and the long lot is maybe about a hundred; because Park Avenue is close up, it is about a hundred.

Q. You said on Park Avenue they were a little over a hundred, one was thirty feet? A. Yes, sir.

Q. And back of there you say they ran— A. From ninety or a little more up to about a hundred, the last lot. Then he asked if there were any restrictions there and Mr. Muller said that is what he heard, that a saloon daresn't come in there, and 30 Mr. Weiss said, "I don't care. I won't put any saloon." And Mr. Weiss said to Mr. Muller, "It will cost a lot of money to dig it out, the rocks there." And he said he buy a lot about ten or twelve years ago, and he said it would cost ten or twelve hundred dollars and maybe it would cost more, and Mr. Muller says, "It will cost maybe twice so much to do it." And he said, "I don't know, but it will cost to-day so much more." And we talked about the price and we went away. When

I went away with Mr. Weiss, Mr. Weiss say to me, "Well, I know the price and everything and I got to find out what the rocks is going to cost to take out."

Q. You know Mr. Weiss's business, don't you?

A. Yes.

Q. What is his business? A. Building.

10

Q. Have you ever seen him excavate rocks himself? A. I seen him now when he built that house on Fifth Street, the same house we swapped there.

Q. You saw him excavate rocks there? A. Yes.

Q. Was he doing it himself? A. He got the men and then he said to me, "I could not say anything now. I got to find out what the rock is"—

Mr. Dippell: I object. There is no question pending.

20

Q. Go on. A. Mr. Weiss said to me, "I got to find out—"

Mr. Dippell: I object.

The Vice Chancellor: Direct the witness to the question.

Q. What did Mr. Weiss say to you about the lot?
A. Well, he was going to find out what it will cost to take out. There was a whole lot of rocks there and he said he will let me know in a couple of days. And in two or three days I see Mr. Weiss and I say, "Do you know what the price is?" "No, I see the people, but I got no price yet." And I see him again in a couple of days, in three or four days, and he says, "Well, I don't know yet." And I see him again and he say, "Well, I expect to-day I get the price."

30

40

Q. Just an estimate? A. Get an estimate, yes. Well, I say, "I see you to-morrow." I see him the next day and he say, "I know what it is going to cost me," and he said between four thousand and forty-five hundred dollars. That is what he said to me. Then he talked about the price and he asked
10 his price, forty-eight thousand dollars, and he had offered him less, and we talked around about the price and he come down in his price from the property and I brought him down there to Mr. Muller's house.

Q. When was this, how long before Christmas about? A. That was about Tuesday, a week before Christmas.

Q. Yes. A. I brought him down to Mr. Muller's house and talked about the price and he asked again
20 from the lots, the front and back, and Mr. Muller told him just the same, the front is over a hundred feet, and the back is from ninety feet up and the last lot is about a hundred, and across the street it was two, and Mr. Weiss said, "The lot would cost a whole lot to take out and Mr. Muller answered just the same, that he can take them out about ten or twelve years before when he bought him, from two thousand to twenty-five hundred, and it cost more now, and he asked about the restriction and he said
30 he heard the saloon daresn't go in there.

Q. When did you see him again? A. Mr. Weiss? Then we talked over there about nearly three-quarters of an hour and we went away and there was a difference in the price of about a thousand dollars. I see him again the next day and he say to me, "Well, we got to try to get out the thousand dollars more. I will tell you, Haber, what I am going to do now. I am either going to build a house there because the rocks cost a lot of money to take out,

and I want to sell the house anyway," and I am satisfied to make a start and I went up to Muller and talked around with the thousand dollars more, and he would not come up, and the next day when I talked with Weiss again I said, "Well, we go up there. We are going to try to get a thousand dollars more, and if I don't get a thousand dollars more we will make a deal anyhow." 10

By Mr. McDermott:

Q. Who said that? A. Weiss. I went up there the Thursday before Christmas and Muller saw us again, and we talked around with the thousand dollars and he said, "Come down five hundred dollars," and Mr. Muller say, "No." He said his price and I would not give any more than forty-five thousand dollars, and about eleven o'clock he said, "All right." 20

By Mr. Weller:

Q. In the day time or in the night, P. M.? A. In the night, P. M.; and he talked around about the restrictions again, and he said he heard he daresn't put in a saloon, and Mr. Weiss said he did not care, he would not put a saloon there, and I called up Mr. Haber to make the contract. 30

Q. Your son? A. Yes; I called him up by telephone and he come over there and was talking around again about the lots and restrictions, and he say the same, that is all I heard, and the lot is so deep, and we make the contract and the contract was signed and we read it over to Mrs. Muller and Mrs. Weiss, both together, my son called the others and read it over again and explained it to Mrs. Muller in English, because she does not read Eng- 40

lish, which this is the price, and we were talking about the contract and he asked again about the saloon and about the depth of the lot and he say it is the same, over a hundred feet front and the back about ninety, about, the last lot, and Mr. Weiss is satisfied and signed it and then we went home.

10 Q. Did he just after that time tell you about having an option on another lot that he showed you, or later?

Mr. McDermott: I object. That has no relation to this case.

The Vice Chancellor: I will sustain it if it is material.

Mr. Weller: It is material and it has absolute relation to this case.

20 The Vice Chancellor: I will allow it.

30 A. That was on Thursday night, he make the contract and he say to me there, "Haber, come here." I said, "What is it?" "I told you I got another party and that is the reason I hold you up, because the other party come here and get that house and I could make another deal, a couple of thousand dollars, but the other party don't hold it, and I make that deal with you." And I say, "Here is a letter and I can show you the same party, I can make a deal now and get a couple of thousand dollars more." And I said, "What do you wish me—what do you wish to show me the letter now for. You signed the contract. Why do you wish to show me the letter." and he said. "I am a builder, to build houses. Do me a favor. Come over with me to Mr. Muller's house." I said, "What is the use of going over there?" "You go over with me to Mrs. Muller's house and help me. I want to give her a hundred dollars to give me my contract

40

back." And I say, "If you don't want to help me, come over with me." And I say, "Now, I do you the favor. I go over with you," and I go over to Mrs. Muller's house and Mrs. Muller was there and I start talking and he said, "Here, Mrs. Muller, here is a hundred dollars for your trouble. Give me back the contract you got." And Mrs. Muller say, "No; I don't take a hundred dollars. I signed the contract and I want the house and I won't give back the contract." And I started to talk around, half an hour or three-quarters of an hour, and Mrs. Muller says, "No, I don't want it." And he said, "Come on, Mr. Haber. What is a hot headed Dutch woman anyway?" And I went away. 10

Mr. McDermott: I move to strike out all that testimony. 20

The Vice Chancellor: I will allow it to stand

By Mr. Weller:

Q. Now, it has been testified by Mr. Weiss that that night, that the contract was drawn and signed, that Thursday night, that Mr. Muller said there were no restrictions on this property.

Mr. McDermott: I object to that. 30

The Vice Chancellor: On the ground that it is leading?

Mr. McDermott: On the ground it is leading, and on the ground this man has already testified to what was said exactly, and I do strongly protest against the words being put into this witness' mouth now.

The Vice Chancellor: I will sustain the objection. 40

Mr. Weller: I should think in rebuttal that is perfectly proper.

The Vice Chancellor: It is not perfectly proper to put the words into the witness' mouth. Why don't you say, "Was there anything further?" I will allow that to stand.

10

Q. What was said that night about the restrictions?

Mr. McDermatt: I object because the witness has already testified to what was said in great detail.

By the Vice Chancellor:

20 Q. What was said about the restrictions? A. Mr. Weiss asked again and he say, just what he heard, that he daresn't put in a saloon.

Q. Who said that? A. Mr. Muller.

Q. What did Mr. Weiss say about it? A. Mr. Weiss said he don't care; he don't put in a saloon.

By Mr. Weller:

30 Q. Did you hear any talk as to what your son had put in the contract, about that? A. I heard just what Mr. Muller say, that he daresn't put in a saloon there, and Mr. Weiss said he don't care.

By the Vice Chancellor:

Q. Did you hear any conversation as to what your son was to put in the contract?

Mr. Weller: About restrictions.

The Witness: About restrictions?

The Vice Chancellor: Don't try to guess at it if you did not hear it.

40

A. To put in the restriction that there was no restriction there except there could not be a saloon there. There was no saloon dares to be put in there.

By Mr. Weller:

Q. Were you down in Mr. Haber's office in Jersey City when they came down there? A. Yes, I was there.

10

Q. What talk did you hear there? A. Mr. Dippell was there in the office and he asked Mr. Muller again about restrictions, and Mr. Muller say just what I say. He asked me and I say he daresn't put in a saloon, and Mr. Dippell asked him again if he won't allow five hundred dollars and he could take the property, and Mr. Muller and Mrs. Muller say, "No, he wouldn't allow five cents."

20

Q. Did Mr. Weiss say anything about your reducing your commission? A. Well, just what I say. I was saying something now but they stopped me now.

Q. Well, go on. A. It was on Monday or Wednesday he see me again and he say, "Here, do me a favor." And I say, "What is it?" "Now you come up with me again to Mrs. Muller's and you come up with me again and if she allow me five hundred dollars or if I allow for the commission two hundred dollars off, you can make the deed." I said, "Why do you want my two hundred dollars to come off on the commission." And he said, "Never mind, I want your two hundred dollars off and I want Mrs. Muller to allow five hundred dollars off the price I give for the property." And I said, "All right, I will go with you, but I am not satisfied to take two hundred dollars off the commission. If

30

40

Mrs. Muller wants to take off five hundred dollars, I don't care. But I said, "You come up with me" and we went up there and talked around half an hour or three-quarters of an hour and I said, "Mrs. Muller, if you allow the five hundred dollars before I get the commission you can't make the deal." 19 And Mrs. Muller says, "I won't allow five cents. I buy the property and I am going to keep it." And they talked about the property not being built right, the plumbing leaked, and the roof no good, and she is dissatisfied and she better take the price and drop off five hundred, and Mrs. Muller says, "I don't come down five cents for the sale." Then we went away.

Cross Examination by Mr. Dippell:

20 Q. You say you have been in the real estate sixteen or seventeen years. A. Yes.

Q. Do you have any forms or any memorandum that you usually use when you get particulars of property that is listed with you for sale? A. That is all what I get it, yes.

30 Q. Have you got any printed form you use for listing the property? You usually take down the particulars about the property when you are going to handle it for sale or exchange, do you not? A. Yes, I take the particulars, the rent, and the mortgage; that is all I take. So much rent, so much mortgage, so much for the property, and so much price.

Q. You don't take the size of the lot? A. Yes, I ask the customer how wide is his lot and how deep.

Q. You have not got the particulars with you that you received from Mr. Muller as to these

40

lots, have you? A. When Mr. Muller give me the lots for sale I told Mr. Weiss when we come down to Mr. Muller in the store what he asked me and what Mr. Muller explained.

Q. Did you make any written statement of what Mr. Muller told you about the lots when he listed them for sale? A. Yes; he told me he got four lots and one of the lots the front was over four hundred feet. That is what he told me. 10

Q. Did you make any written statement of the particulars that Mr. Muller gave you at the time he listed the property with you for exchange—yes or no. Did you make any written statement? A. No. I got a—

Q. You did not mark down— A. I don't mark down the real estate at all. That is the way I am doing seventeen years' business. I take the lots and the price and the rent. 20

Q. You were the agent for both parties in this transaction, were you not? A. Certainly.

Q. You were to be paid commission by both parties? A. Yes, sir.

Q. And it was your son who drew the contract? A. Yes, sir.

Q. And where does your son live? A. He lives by me. He is not married.

Q. Where is that? A. At 718 Angelic Street, West Hoboken. 30

Q. How far is that from Muller's home? A. I don't know. I couldn't count.

Mr. Weller: A couple of miles away.

Q. Is it about two miles? A. I don't know. Maybe a mile. I don't know. I don't like to say if I don't know. 40

Q. Where did you telephone to your son? Where was your son when you telephoned to him?

A. My son was home. I telephoned. I called up in the saloon there from Mrs. Muller's place there, I guess, on Broadway, a corner saloon, and I telephoned for my son to the home. It was about
10 eleven o'clock.

Q. Wasn't your son nearby somewhere in Fourth Street that night? A. No, sir.

Q. Did you have any form or contract which was used in this matter with you at the time when you went there to Muller's house, or did your son bring the papers with him? A. I telephoned my son to come over here and make the contract, or two contracts. I did not have anything to do with his papers.

20 Q. What was your total commission to be on this deal? A. My commission was about—my commission was over one and one-half per cent., one and one-half or a little over. I could not tell just exactly.

By the Vice Chancellor:

Q. On both sides one and a half? A. Mr. Weiss.

Q. What from the other side?

30 By Mr. Dippell:

Q. What were you to get from the other side? A. I could not tell you.

By the Vice Chancellor:

Q. You remember that. You would not forget the commission. A. I guess two per cent. or two and a half. I am not sure. Two to two and a half from the other side.

40

By Mr. Dippell:

Q. Well, the contract provides two per cent. on Muller's. Do you say that it is it? A. I say I am not sure, two or two and one-half.

Q. The price is fifteen thousand dollars? A. Yes.

10

Q. So you got two per cent. on that, three hundred dollars? A. I am not sure. I would not say for sure.

Q. And about six hundred and seventy-five dollars from Weiss. A. I do not think as much as that. It might be six. I don't figure it out.

Q. Now, Mr. Haber, you remember distinctly the size of that corner lot was thirty feet. A. They said about thirty feet. I am not sure. About thirty. It is more than one hundred feet in front. It is a corner lot, about thirty.

20

Q. But he was very careful to say it was between ninety and a hundred feet in length on Sixth Street. A. From ninety up, about to a hundred, or less than that, or less, maybe.

Q. It was about ninety or a hundred. A. He was not sure. He said about ninety up. He could not say exactly—about.

Q. Don't you remember any talk at a meeting at your son's office when I was there relating to the size of these lots? A. When you were there in my son's office?

30

Q. Yes. A. Yes. I heard you ask from Mr. Muller about restrictions and Mr. Muller told you he didn't know nothing at all only what he heard when he bought it, that he daresn't put in a saloon there. That is what I heard in the office.

Q. You did not hear anything about the size of the lots then? A. You asked about the lots and he

40

told you just the same, from ninety or about a hundred. The last lot is about a hundred. The front is over a hundred.

Q. So you do remember now there was talk about the size of the lots? A. You asked me again and Mr. Muller explained just what he said to me.

10 Q. Do you remember our talk then about having an allowance on the purchase price for the shortage in the lots? A. You asked if he could allow five hundred dollars on the money and Mr. and Mrs. Muller say they would not allow five cents.

Q. Do you remember whether five hundred dollars was the amount I said? A. Five hundred dollars allowed, I hear.

20 Q. Now, standing in Sixth Street, you could see the size of those lots? A. I could not say just exactly how wide. I could not say it. Nobody can say it, just how many feet, to a foot, more or less.

Q. How long did these transactions take, from the time that you started to put in the sale between Weiss and Muller and the contract being actually signed? A. Nearly about three weeks; about three weeks.

30 Q. In that time how often did you see Weiss? A. About three or four or five times. I could not say just exactly.

Q. Did he ever ask you what the size of the lots was? A. He was there by Mr. Muller and Mr. Muller explained that night about the size.

Q. He kept on asking about the size all the time? A. No; he don't ask no more, only I was there by Mr. Muller and Mrs. Muller and he knew the size and the depth.

Q. Did he ask at the time of the signing of the contract? A. When he signed the contract he

talked about the restrictions and the frontage and depth and he talked again around Mr. Weiss, and he said he did not care to build; he was going to sell the lots if I got a customer—

The Vice Chancellor: Never mind that.

Q. Do you remember who had written the letter that Mr. Weiss showed you? A. What? 10

Q. You spoke about a letter that Mr. Weiss had, that he could sell this property of his, at an advanced price. Do you remember who it was wrote that letter? A. I did not see. He took out a letter from his pocket and he said to me, 'Here, Haber, I can show you a letter I got.' And I said, 'I don't want to see it. What is the use of showing me the letter?' And he put it back in his pocket and I said, 'I am not interested.' I say, 'The contract is— 20

Q. Never mind. Answer the question.

The Vice Chancellor: He said he did not see it.

Mr. Dippell: Yes.

Q. And he did not tell you who it was? A. He told me the same party what he got it, and that is the reason he don't make the deed so quick with me, because he got the same party. 30

Q. He did not tell you the name of the man? A. No.

Q. You had charge of the sale of this house before? A. The same house, yes.

Q. You tried to sell it to a party in Second Street? A. Yes.

Q. How long before this transaction of Muller's was it you were trying to sell the house to the Second Street party? A. Oh, it must be—I could not tell you exactly. I could not remember—three-quarters of a year or a little less or a little more. I don't remember.

10 Q. You don't remember about that transaction at all, do you, about the Second Street transaction? You don't remember how long before this transaction it was? A. I don't remember just how long.

Q. Do you remember trying to negotiate a sale with Mr. Weiss at the same time? A. On what property?

Q. The same property. Do you remember whether you were trying to negotiate a sale with a party living on Second Street, whether anybody else was trying to negotiate a sale with Mr. Weiss? A. I don't remember.

20 Q. Now, as a matter of fact, wasn't it just at that time that Mr. Weiss said he had received that letter, at the time when you were trying to negotiate the sale with this party on Second Street, prior to the time the contract with Weiss was made? Wasn't it prior to that time he said he had received a letter? A. No, sir; he said he had received a letter after the transaction was made with Mr. Muller, which was on a Monday, and we make the contract on Thursday night at eleven o'clock, and he say, "Haber, help me out, now. I can make more money now—"

30

The Vice Chancellor: Never mind that now.

Q. When did you talk this case over with your son last? A. With my son?

40 Q. Yes.

Mr. Weller: I object to that question.

The Vice Chancellor: I will allow it.

A. I don't talk to my son about the case at all. I attend to my business.

Q. You did not talk to your son since we had a meeting at your son's office? A. You had a meeting in my son's office— 10

By the Vice Chancellor:

Q. Did you talk to him since about the case?

A. No.

By Mr. Dippel:

Q. Did you talk to Mr. Weller about the case?

A. I did not talk to Mr. Weller at all.

Q. Did you talk to Mr. Weiss about what was said at that time when you had the meeting at Mr. Muller's home? A. At Mr. Muller's home? 20

The Vice Chancellor: I assume he did. That he talked it over with his son, Muller and Mrs. Muller and everybody else.

Q. You did not talk about this case at all? A. Nothing at all.

The Vice Chancellor: If he did, he had a right to. 30

ISADOR HABER, recalled for the complainant.

Direct Examination by Mr. Weller:

Q. Mr. Haber, were you up to look over these lots with me the other night, a week or so ago? A. Yes, sir. 40

Q. We went down to the lots and looked them over? A. Yes, sir.

Q. What kind of a house is at the end of these four lots on Sixth Street? A. A two-family brick house, which is on the Key lot.

10 The Vice Chancellor: Hasn't this been gone over?

Mr. Weller: It has not.

Q. You then saw the house at the south end of the lots? A. That is the same house on the south side, yes.

Q. Did you notice there was a fence there from that house back to the corner? A. Yes.

20 Q. What encloses these lots on the south of Sixth Street and on Park Avenue, of anything? A. The lots are open on Park Avenue, and the lots are open on Sixth Street.

Q. Is there any sidewalk there? A. Oh, yes, a long sidewalk on both streets.

Q. Standing on those lots can you see the dimensions or boundaries? A. If you are on the lots?

Q. And you can also from the streets? A. You can see the houses in the rear and the tops of the fences.

30 Q. What occurred in Mr. Haber's office at the time Mr. Davis came there with his search from the Court House? Mr. Davis testified the other day Mr. Weiss addressed Mr. Muller when he found out there were restrictions and he told him there were no restrictions except the saloon and Mr. Muller could not explain that. He said he did not know of any restrictions except, "that you could not have a saloon." Now you remember his testifying to that, do you? You remember Mr. Davis testifying to that? A. Yes, in Court here, yes, sir.

40

Q. Was anything said about these restrictions before Mr. Davis got here that day? A. That was the time they were all together before Mr. Davis got there. He got there later on.

Q. Mr. Dippell said you looked at the deed and talked about the restriction and he looked at the deed. A. If I remember right Mr. Dippell said this deed, the Gerber deed to Mr. Muller, shows restrictions, and he pointed it out to me. 10

Q. That was before Mr. Davis got there at all? A. Yes, sir.

Q. He says that he asked you how did it come—

Mr. McDermott: Objected to.

Q. This is Mr. Dippell. Mr. Dippell says: "Before Mr. Davis got there I spoke to Mr. Muller about the restrictions and I asked him if he had his deed there and he said he had, and I called his attention to the restrictions printed in the deed of Mr. Gerber, to Conrad Muller." Is that part true? A. Yes; that is right. 20

Q. "And I said to him, how did it come that he did not tell what the restrictions were." And he said—that is, you said—Isadore Haber said if they had a conversation between Weiss and Muller as to the restrictions he did not hear it." Is that true? A. No, I did not say that to Mr. Dippell. 30

Cross Examination by Mr. McDermott:

Q. Mr. Haber, do I understand from what you say that you mean to say what Mr. Dippell swore to is not true? A. To my best recollection I did not tell Mr. Dippell that, and I did not hear what was said that night.

Q. Do I understand the testimony read over to you as being given by Mr. Davis—do you wish to say that is not true? A. I know positively Mr. Davis came in there after the talk about restrictions.

10 Q. Mr. Davis came in with the searches? A. Mr. Dippell said he was waiting for Mr. Davis to come up with the searches, and he did come up, practically at the end of the whole—

Q. I want to ask you if you say now what Mr. Davis testified to is not true? Is that what you mean to say? A. Well, if you will repeat what Mr. Davis said.

20 Q. This has already been read. "Mr. Weiss addressed Mr. Muller when he found there was a restriction and he told him why, he told him there was no restrictions except the saloon and I could not understand that Mr. Muller could not explain that, and he said he did not know of any restrictions except you could not have a saloon." A. That was not said.

Q. That was not said? A. No, sir.

Q. So what Mr. Davis testified to there you say is absolutely untrue? A. He is wrong.

Q. Untrue? A. Yes.

30

CONRAD MULLER recalled for the complainant.

Direct Examination by Mr. Weller.

40 Q. Mr. Muller, Mr. Weiss testified that at the time you signed the contract up in your house that he asked you what restrictions were on the place

and you told him there were no restrictions with the exception you did not dare have a saloon there. Is that true?

Mr. McDermott: I object to that as being leading, and because it has already been gone over, and Mr. Weiss has testified to it. 10

The Vice Chancellor: Yes.

Mr. Weller: If it has been gone over I do not want to go into it again. But I do not think it is leading.

The Vice Chancellor: Well, it is leading.

Mr. Weller: If he has told the story I do not want it again.

The Vice Chancellor: If you recall the story, he said he did not say anything about restrictions or anything else. 20

Mr. Weller: He said he heard there could not be any saloon there, but he did not know whether that was true or not.

By the Vice Chancellor.

Q. You have been on the stand before? A. Yes, sir.

Q. Do you remember the first day of February when you were up in Mr. Haber's office in Jersey City? A. Yes. 30

Q. What time did you go there that day? A. I think it was about—I don't know if it was twelve or one o'clock or what it was, but I think it was around one o'clock. I am not sure.

Q. In the afternoon? A. I think so.

Q. It has been testified that Mr. Weiss asked you why you did not tell him there were restrictions on this place and you did not answer. Is that true?

Mr. McDermott: I object. That has been gone over.

The Vice Chancellor: Yes; I do not want to re-emphasize Mr. Muller has said about it. Unless you want to put him on in rebuttal.

10

Mr. Weller: I think it is rebuttal, that last question.

(After argument)

The Vice Chancellor: I will let it stand. Note an objection to it as being repetition and being rebuttal testimony after the testimony has been taken.

Q. Go on then, Mr. Muller. A. What, Mr. Weller?

20

Q. (Last question read) This being Haber's office on that day? A. In Haber's office? Sure I told him I did not know what is on it.

Mr. Weller: That is all.

Mr. McDermott: That is all.

NATHAN WEISS, the Defendant, recalled.

Direct Examination by Mr. McDermott:

30 Q. Mr. Weiss, something has been said by Mr. Haber about estimates, about taking away the rock. When were those estimates secured by you? A. That was after the contract was signed.

Q. He also spoke about a letter which you showed him and which he said was from some other possible purchaser of the house.

Mr. Weller: I think I asked him all about it on cross examination and he denied it.

40

A. The time he had a different customer on Second Street, he went back and forth with me with a man to buy the house and the man was ready to buy the house and afterwards the man himself said he heard so much about Mr. Haber being a swindler he would not have anything to do with him.

Q. When was that? A. That was the time when we went back and forth to Second Street. I received a letter from Mr. Everett of the Title Guaranty & Trust Company— 10

Q. With relation to the time of the contract, when was that? A. That was the time he had the Second Street proposition for me.

Cross Examination by Mr. Weller.

Q. Who was that man? A. He called to buy the house.

Q. Who told you Mr. Haber was a swindler? A. A man on Second Street. 20

Q. Who is he? A. There was a man told me that lives in—

Q. Who was it? A. I do not know the name. I can bring you to his house.

Q. Whereabouts on Second Street? A. That man lives where Haber brought me.

Q. Whereabouts on Second Street? A. I do not know the number. I can take you to the house, a house on Second Street at Park Avenue. 30

Q. What business is the man in? A. Real Estate agent, and he told me because he heard what kind of a man Haber is—

Mr. Weller: That would be hearsay, your Honor.

The Vice Chancellor: Yes.

Q. Can you tell the man's name? A. No, sir, but I can take you to the house. 40

Q. You say he is a real estate man? A. Yes, sir, and there was another party where he got five hundred dollars.

Mr. McDermott: Wait. Don't say that unless you are asked about it.

10

The Vice Chancellor: Strike that out.

Q. How long have you known Mr. Haber? A. About five or six years ago, when he had trouble with my father.

Q. How long have you been doing business with him? A. Only since he brought that butcher from Second Street.

Q. When was that? A. That was a couple weeks before Muller—oh, no; that was on Fourteenth Street about two years ago, he had a party on a Fourteenth Street house?

Q. For you? A. Yes.

Q. Now, you do not need to say anything about that. Can you recall the name of the real estate man on Second Street? A. I cannot. I can recall a dozen men who know Haber.

Q. Has this real estate man an office there? A. No, sir; he has not.

Q. Is the man's name Godfrey? A. It is Cohen, a real estate agent.

Q. On Second Street? A. Yes, the one that told me, I met him on Second Street.

Q. Is his name Cohen? A. Mr. Haber knows his name.

Q. Is his name Cohen? A. Yes.

Q. And he told you Mr. Haber was a swindler? A. Yes.

40

Opinion.

IN CHANCERY OF NEW JERSEY.

Between

CONRAD MULLER, et al.,
Complainants,
and

NATHAN WEISS, et al.,
Defendants.

Memorandum. 10

On pleadings and proofs.

Messrs. Weller & Lichtenstein, for the complainants.

Mr. J. Philip Dippel and Messrs. McDermott & Enright, for the defendants.

LEWIS, V. C.:

20

This bill is filed for specific performance of a contract dated December 23, 1915.

By this contract Nathan Weiss and wife agreed to sell and convey to the complainants certain land and tenements described in the bill of complaint, for the consideration of \$45,000.00, subject to a mortgage of \$25,000.00; and the complainants agreed to sell and convey to Weiss and wife the lands secondly described in the bill, for the consideration of \$15,000.00 subject to a mortgage of \$2,500.00, and to pay the difference of \$7,500.00 as follows: \$1,000.00 in cash on the passing of title, and by giving back to Weiss and wife a mortgage for the sum of \$6,500.00.

30

On the date fixed for the passing of title, the defendant refused to take title, for the various alleged defects, the principal one being that there were restrictions on the land of complainant of which he was not advised. On this question there

40

was considerable evidence taken before me. It appears from this that the contract was drawn late at night by Isador Haber, a member of the bar. Weiss asked, as he had done on two previous occasions, whether or not there were any restrictions on the land; and Conrad Muller, the complainant, said he had heard that the town authorities would not allow any saloon there.

10

The contract was executed by both parties. The scrivener, Haber, made it read: "Subject to all restrictions of record."

20

It is clear to my mind that the defendants were misled, for not only were these restrictions as to the maintenance of a saloon on the property, but also one which prevents the carrying on of manufacturing; and the one which raised the greatest objection on the part of the defendant, which prevented the building of an apartment house on the premises.

30

It is apparent from the testimony that it was known that the defendants contemplated putting up an apartment house. Muller had exhibited to Weiss during their transactions, a blueprint, prepared when Muller expected to erect such a building; and Weiss proceeded, undoubtedly, with the negotiations with Muller in the belief that he could so use the property.

The complainants show by their subsequent action that the understanding as to the restriction was as Mr. Weiss testifies, for their attorney went to Gerber, the grantor of the Mullers, to secure a deed from him releasing the restrictive covenants.

40

The effect of such a deed, however, would not be to preclude the parties to whom he made deeds previously or subsequently, from enforcing their rights against any purchaser violating the restrictive covenants.

- DeGray vs. Monmouth Beach Co., 50 N. J. Eq., 329;
 Henderson vs. Champion, 83 N. J. Eq., 554;
 Wooton vs. Seltzer, 83 N. J. Eq., 163.

The statement of Muller as to the size of the lots also appears, from the testimony, to be material misrepresentation. He said the corner lot was 30 feet by 95 feet; and the inside lot 25 feet by 100 feet. As a fact, the corner was 30 7/100 feet by 93 46/100 feet on the street lines; and the other three lots all less than 100 feet in depth, although the center line of number 55 is about six inches over 100 feet. This tract is not a large one, and the difference in area, as represented by the complainant, is substantial; in the building of a large apartment house on it as contemplated by Weiss its size was a matter of considerable financial interest.

There is also evidence as to a misstatement of Muller as to the cost of excavating the rock on the property. These misstatements are in themselves sufficient to warrant me in denying specific performance. In suits for specific performance anything said or done to mislead the purchaser compels the Court to deny relief to the complainant.

- Bowker vs. Cunningham, 78 N. J. Eq., 458;
 Pratt vs. Lyons, 51 N. J. Eq., 308;
 Brisbane vs. Sullivan, 86 N. J. Eq., 411;
 Neptune Fisheries Co. vs. Cape May Real Estate Co., 105 Atl., 212.

There is, however, another phase of this case which must be adverted to now. The testimony of the scrivener as to the transaction, late at night, is rather astonishing, coming from a member of the bar. He says he was called in to draw the contract, which was prepared at the Muller home. His

10 father, Hill Haber (a witness), a real estate man, sent for him prior to the meeting at the Muller home. Hill Haber had talked with Weiss and suggested that they ought to have the contract executed that night. Weiss told him that he ought to see his lawyer if that was the case, but he, nevertheless, went to the Muller home and then young Haber was sent for. The elder Haber was interested in putting the transaction through. He wanted to close it to get his commissions. The parties present when the contract was signed, therefore, were the Mullers, Hill Haber, Isador Haber, his son, and Weiss. Isador Haber's evidence is, that he was the attorney for both parties at the time the contract was made. He, however, on the witness stand, says that the reason he did not tell Weiss about all the restrictions is that he did not observe the full page of typewritten restrictions in the deed from which he was copying the description. He says that he did not hear the conversation between Muller and Weiss when Weiss asked about the restrictions, because he was busy preparing the papers. Surely, the defendant, under these circumstances, should not suffer in consequence of young Haber's neglect to make known to him the entire typewritten page of restrictions. In response to a question, under cross examination, Haber said, "I really believe I was derelict, I will admit that, but that is the situation. Possibly, if it had been in the afternoon I would have taken more time, but it was about midnight." Pressing further, the cross examiner asked him: "Q. You have no doubt that Weiss was misled by that? Ans. It appears so from what he says now."

40 The testimony of Hill Haber corroborates to a large extent the statement of Weiss as to his con-

versation with Muller relative to the restrictions, i. e., that all Muller said to Weiss about the restrictions was that a saloon should not be maintained on the property. He was asked by me as to what he heard regarding what his son was to put in the contract about restrictions, and his reply was: "Ans. To put in the restrictions that there were no restrictions there except that there should not be a saloon there; there was no saloon dares to be put in there." 10

There is little doubt that it would be a hardship to compel Weiss to take the title. The evidence satisfies me that the complainants are seeking an advantage. Their testimony is contradictory and unsatisfactory. They have endeavored to convey the impression that their lack of knowledge of the restrictive covenants in their deed was due to unfamiliarity with the English language; yet, in completing the transaction they had the services of a lawyer whose father was interested in closing it with Weiss to secure his commissions. 20

I cannot escape the conclusion that when Weiss contracted to take the complainants' property, the only restriction he had been informed of was as to the non-use of the property for saloon purposes. I am satisfied that he was misled. He is not a man of much information and experience and he was without anyone at hand to advise him when the contract was executed, and a mere perusal of the testimony of young Haber will satisfy anyone that he made no attempt to give him any information regarding the restrictions contained in the same. 30

Specific performance will not be decreed where it will work a hardship or an unfairness, but the Court must be satisfied that the claim is fair, reasonable, just and equal. 40

Specific performance in this case must be denied.

Exhibit C-1.

ARTICLES OF AGREEMENT, made this 23rd day of December, nineteen hundred and fifteen, BETWEEN Nathan Weiss and Maggie Weiss, husband and wife, of the town of West New York New Jersey, parties of the first part, and Conrad Muller and Anna Muller, husband and wife, of the same place, parties of the second part:

10 WITNESSETH, as follows: The parties of the first part, in consideration of One Dollar, paid by the parties of the second part, the receipt of which by the parties of the first part is hereby acknowledged, and also in consideration of the conveyance by the parties of the second part of real property hereinafter mentioned, hereby agree to grant and convey to the parties of the second part, at a valuation for the purpose of this contract of 20 Forty-five thousand (\$45,000.00) Dollars, ALL those two certain lots, parcels or tracts of land and premises and the buildings thereon erected situate in the town of Union, Hudson County, N. J., and known as lots fifteen (15) in block ten (10) on map A of a portion of the property belonging to Cassitt Land and Improvement Co. 1895, and lot fourteen (14) in block ten (10) in map of property belonging to Clifton Park Realty 30 Co., lying in the Town of Union and West New York County, block No. 2445, dated, March, 1905, each lot being approximately twenty-five (25) feet wide in front and rear and one hundred (100) feet deep on both sides, the former lot being conveyed to Nathan Weiss by C. S. Goldberge, Inc., by deed dated April 21, 1915, and recorded in Liber 1202 of Deeds at pages 367, etc., and the latter lot being the lot conveyed to Nathan Weiss, by William, Peter Brewing Company, by deed dated, April 40 10th.

21, 1915, and recorded in Liber 1202 of Deeds at pages 369, etc.

AND the parties of the second part, in consideration of One Dollar paid by the parties of the first part, the receipt of which by the parties of the second part is hereby acknowledged, and also in consideration of the conveyance by the parties of the first part of the real property hereinbefore mentioned, agrees to grant and convey to the parties of the first part, at a valuation for the purposes of this contract of Fifteen thousand (\$15,000.00) Dollars, ALL those four certain lots or tracts of land and premises situate in the Township of Weehawken, N. J., which on a "map of property belonging to John G. Gerber, in the township of Weehawken, Hudson County, N. J., County Block 2175" and filed on the 15th or 16th day of February, 1904, in the Hudson County Register's office, are known and designated as lots numbered fifty-two (52), fifty-three, (53), fifty-four (54), and fifty-five, each being approximately twenty-five (25) feet wide in front and rear and about one hundred feet (100) deep, except the corner lot, the aforesaid lots being on Park Ave., being part of the same premises conveyed to Conrad Muller, and him and his wife Anna by two deeds from John J. Gerber et ux, but dated June 1, 1906, and recorded in Liber 940, at page 537 and deed dated April 23, 1907, and recorded in Liber 983, at pages 1069, etc.

Said premises which are to be conveyed by the parties of the first part are to be conveyed subject to the following incumbrances:

A mortgage in the sum of Twenty-five thousand (\$25,000.00) Dollars, held by the Title Guaranty

10

20

30

40

& Trust Co. All restrictions of record in the claim of title.

Said premises which are to be conveyed by the parties of the second part are to be conveyed subject to the following incumbrances:

- 10 A mortgage in the sum of Two thousand five hundred (\$2,500.00) Dollars held by Albert Scher-decker.

All restrictions and covenants of record.

The difference between the values of the respective premises, over and above incumbrances shall be deemed for the purposes of this contract to be Seven thousand five hundred (\$7,500.00) Dollars in favor of the parties of the first part, and the said parties of the second part agree to pay the same as follows:

- 20 One thousand Dollars (\$1,000.00) in cash on the delivery of the respective deeds and passing of title.

Six thousand five hundred (\$6,500.00) Dollars by giving a proper bond and mortgage to the parties of the first part with interest at six (6%) per cent for three years with a clause and covenant to pay off the principal the sum of Two hundred (\$200.00) Dollars and interest every three (3) months and a privilege to pay more.

- 30 The parties of the second part hereby agree to pay Hill Haber a commission of Two (2%) per cent. of the sum he receives for this property, at the date set for the passing of title.

Each of the parties to these presents hereby agrees to convey the property above described, as sold by that party, free from all incumbrances, except as above specified, and to execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered to the other party, or to the

assigns of the other party (the deed to be drawn in each case at the cost of the vendor), a proper warranty deed containing full covenants, duly executed and acknowledged to convey and assure to the grantees an absolute fee of said premises.

Said deeds shall be delivered and exchanged on or before the 31st day of January, 1916 at 10 o'clock A. M., at the office of Isador Haber, No. 358 Central Ave., Jersey City, N. J. 10

Each of the parties hereto assumes the risk of loss or damages by fire prior to the completion of this contract on the premises owned by them respectively. The rents of the said premises, insurance premiums and interest on mortgage, if any, shall be adjusted, apportioned and allowed up to the day of taking title.

If there be water meters on the premises, the respective sellers shall furnish readings to dates not more than thirty days prior to the time herein set for closing title and the unfixed meter charges for the intervening time shall be apportioned on the basis of such last readings. 20

All personal property appurtenant to or used in the operation of said premises is represented to be owned by the respective sellers and is included in this exchange.

This contract covers all right, title and interest of the respective sellers, of, in and to any lands lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the premises to be conveyed to the centre line thereof, or all right, title, and interest of the respective sellers in and to any awards made or to be made in lieu thereof, and the sellers will execute and deliver to the purchasers, on closing of title or thereafter, on demand, all proper instruments for the 30 40

conveyance of such title and the assignment and collection of such awards.

AND IT IS UNDERSTOOD, that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

10 IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

	NATHAN WEISS	(Seal)
Witness:	MAGGIE WEISS	(Seal)
ISADOR HABER.	CONRAD MULLER	(L.S.)
	ANNA MULLER	(L.S.)

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

30 BE IT REMEMBERED that on this 23rd day of December, in the year One Thousand Nine Hundred and fifteen before me, the subscriber, an attorney at law of New Jersey, personally appeared Nathan Weiss, Maggie Weiss, Conrad Muller and Anna Muller, who I am satisfied are the persons mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed: and the said Maggie Weiss and Anna Muller being by me privately examined, separate and apart from their said husbands further acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, FREELY, without fear, threats or compulsion of their said husbands.

40 ISADOR HABER,
Attorney at law of the State of New Jersey.

Exhibit C 2.

THIS INDENTURE, made the first day of February, in the year of our Lord One thousand nine hundred and sixteen,

BETWEEN CONRAD MULLER and ANNA MULLER, husband and wife, both of the town of West New York in the County of Hudson and State of New Jersey, 10

AND NATHAN WEISS of the town of West New York in the County of Hudson and State of New Jersey, party of the second part :

WITNESSETH, that the said party of the first part, for and in consideration of One (\$1.00) Dollar and the exchange of property, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever, 20 30

ALL those four (4) certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the township of Weehawken, in the County of Hudson and State of New Jersey, which upon a certain map entitled "Map of property belonging to John G. Gerber, in the township of Weehawken, Hudson County, N. J., County Block 2175" and filed on the 15th day of February, 1904, in the office of the Register of the 40

County of Hudson are known and designated as lots numbered fifty-two (52), fifty-three (53), fifty-four (54) and fifty-five (55), situate on the easterly side or line of Bulls Ferry Road.

10 Being part of the same premises conveyed to Conrad Muller by John G. Gerber *et ux* by deed dated June 1st, 1906, and recorded in Liber 940 of Deeds for Hudson County at page 537, and also the premises conveyed to Anna Muller by John G. Gerber *et ux* by deed dated April 23, 1907, and recorded in Liber 983 of Deeds for Hudson County at page 1069, etc.

20 Subject to a mortgage in the sum of Two thousand five hundred (\$2,500.00) Dollars held by Albert Scherdecker,

Subject to all restrictions of record in the chain of title.

30 The parties of the first part also grant, convey and assign to the party of the second, all the right, title and interest of the parties of the first part, of, in and to any lands lying in the bed of any street, road or avenue opened or proposed, in front of or adjoining the premises hereby conveyed to the center line thereof and all the right, title and interest of the parties of the first part in and to any awards made or about to be made in lieu thereof.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

AND ALSO, all the estate, right, title, interest, dower and right of dower, curtesy and right of courtesy, 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 above described premises, and every part and parcel thereof, with the appurtenances TO HAVE AND TO HOLD, all and singular, the above mentioned premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, to their own proper use, benefit and behoof forever. 10

AND the said parties of the first part, for themselves, their heirs, executors and administrators, do covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that the said parties of the first part at the time of the sealing and delivery of these presents, are lawfully seized in their own right of a good, absolute, and indefeasible estate of inheritance in fee simple, of and in all and singular the above granted, bargained and described premises, with the appurtenances thereunto belonging, and have good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid. 20 30

AND that the said party of the second part, his heirs and assigns, shall and may at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said parties of the

first part, their heirs or assigns, or of any other person or persons lawfully claiming or to claim the same.

10 AND that the same now are free, clear, discharged, unencumbered of, and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever.

20 AND ALSO, that the said parties of the first part, and their heirs, and all and every other person or persons whomsoever, lawfully or equitably deriving any estate, right, title, or interest, of, in or to the hereinbefore granted premises, by, from, under or in trust for them, shall and will at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and assigns, make, do, and execute, or cause or procure to be made, done or executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted, in and to the said party of the second part, his heirs and
30 assigns forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably advised or required.

AND the said parties of the first part, their heirs, the above described and hereby granted and released premises, and every part and parcel thereof,

with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said parties of the first part, and their heirs, and against all and every person or persons whomsoever, lawfully claiming or to claim the same, SHALL AND WILL WARRANT and by these presents FOREVER DEFEND.

10

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

CONRAD MULLER (L.S.)
ANNA MULLER (L.S.)

Signed, Sealed and Delivered
in the presence of
ISADOR HABER.

20

(Documentary Stamps.)

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

Be it Remembered, that on this first day of February in the year of our Lord One thousand nine hundred and sixteen, before me, the subscriber, an attorney at law of the State of New Jersey, personally appeared Conrad Muller and Anna Muller, husband and wife, who, I am satisfied are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed,

30

40

sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed; and the said Anna Muller, being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, **FREELY**, without any fear, threats or compulsion of her said husband.

ISADOR HABER,
Attorney at Law
of the State of New Jersey.

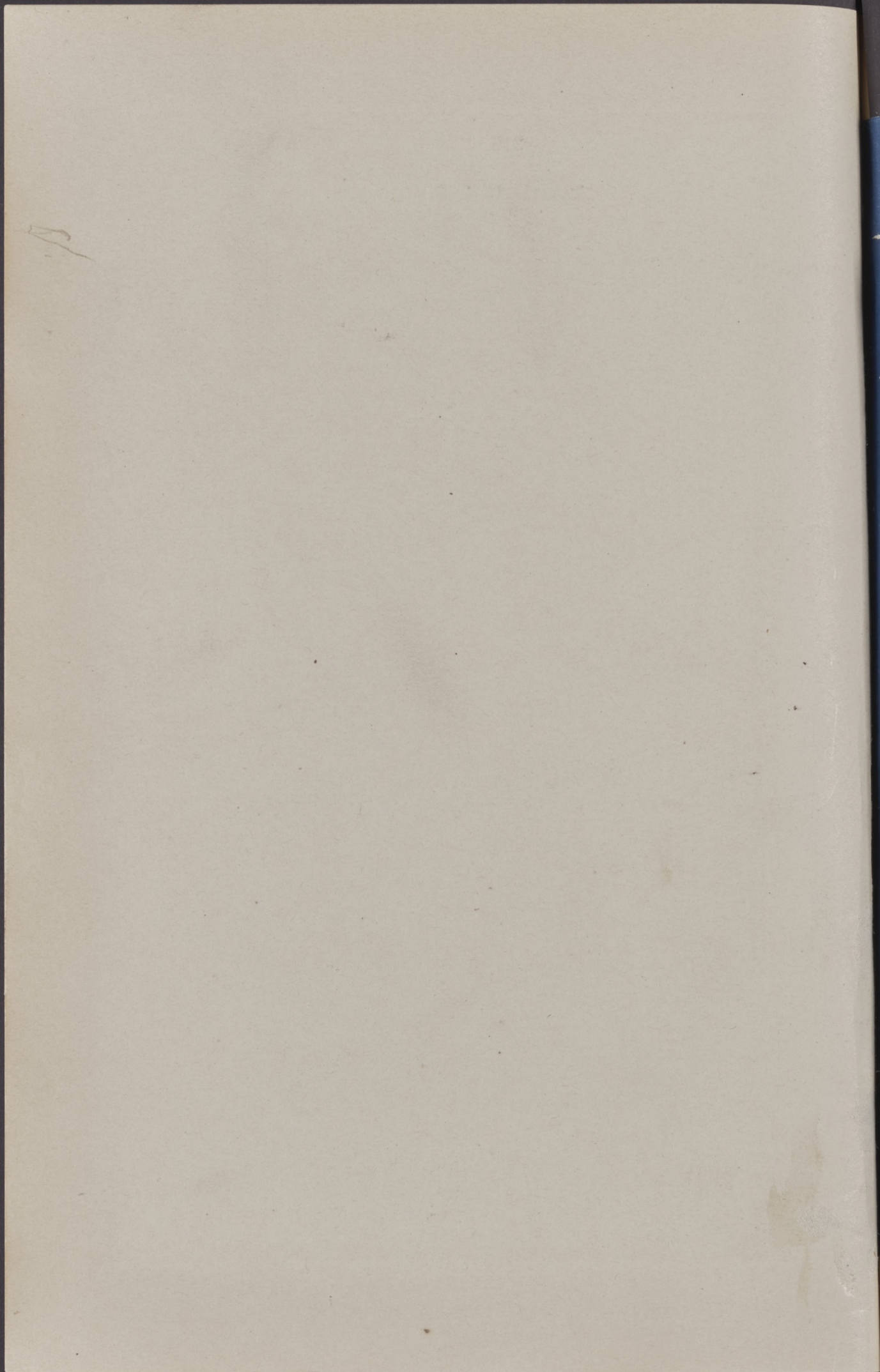
20

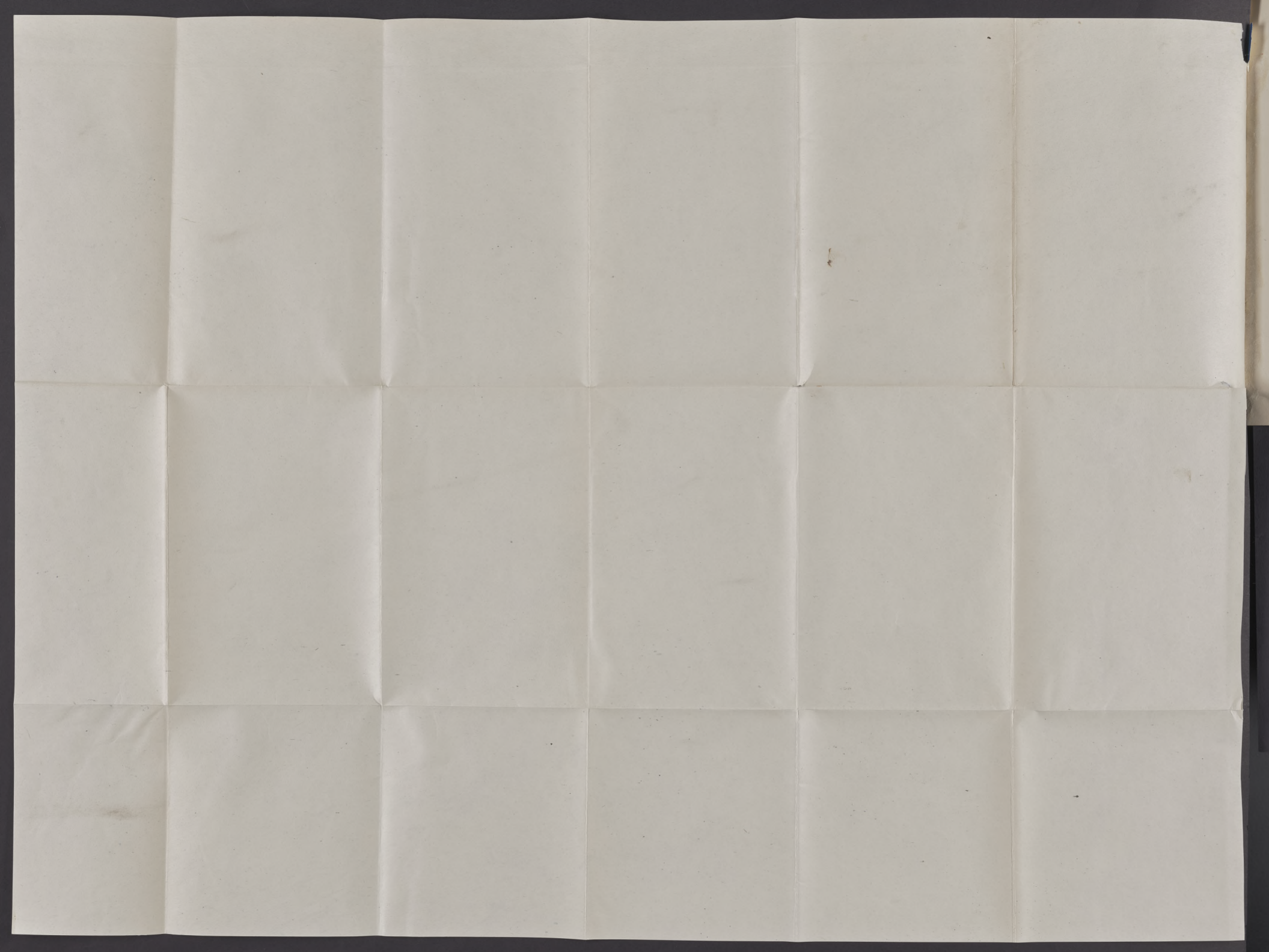
30

40

215

Exhibit C-3.





217

Exhibit C-4.

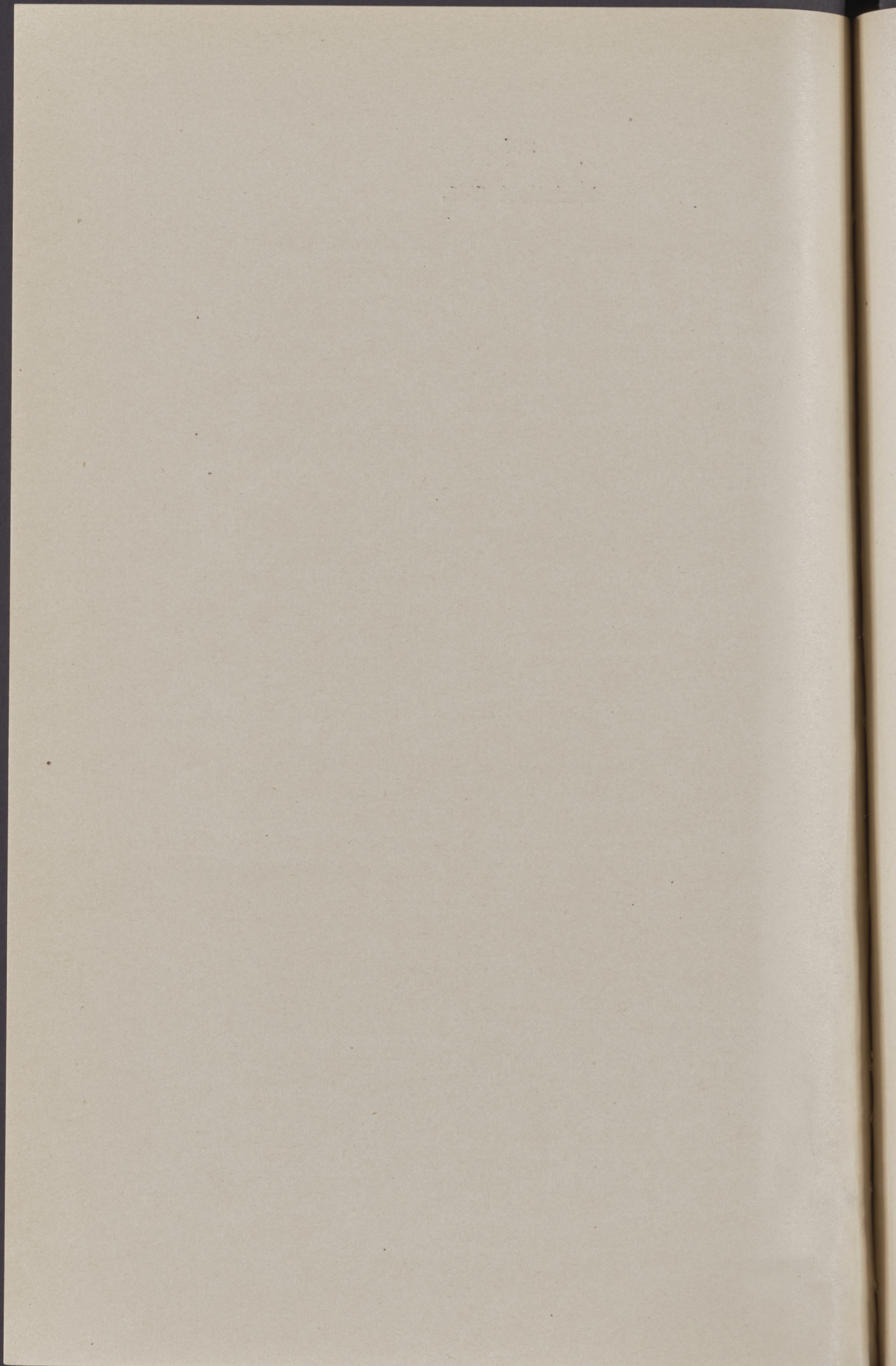


Exhibit C-5.

This indenture made this first day of June in the year of our Lord one thousand nine hundred and six Between John G. Gerber and Ida Elizabeth Gerber his wife of the Township of Weehawken in the County of Hudson and State of New Jersey parties of the first part, and Conrad Muller of the Borough of Manhattan in the City of New York in the County of New York and State of New York party of the second part;

10

WITNESSETH that the said parties of the first part for and in consideration of the sum of One hundred dollars and other valuable consideration lawful money of the United States of America to them in hand well and truly paid by the said party of the second part at or before the sealing and delivery of these presents the receipt whereof is hereby acknowledged and the said parties of the first part being therewith fully satisfied, contented and paid have given granted, bargained sold alienated. released enfeofed conveyed and confirmed and by these presents do give grant bargain sell alien release enfeoff convey and confirm unto the said party of the second part and to his heirs and assigns forever. All those three certain lots tracts or parcels of land and premises hereinafter particularly described situate, lying and being in the Township of Weehawken in the County of Hudson and State of New Jersey which upon a certain map entitled Map of property belonging to John G. Gerber in the Township of Weehawken Hudson County N. J. County Block 2175 and filed on the fifteenth day of February 1904 in the office of the Register of the County of Hudson are known and designated as lots numbered fifty-two (52) fifty-three (53) and fifty-six (56);

20

30

40

Together with all and singular the tenements hereditaments and appurtenances thereunto belonging or in anywise appertaining the reversion and reversions remainder and remainder rents issues and profits thereof.

10 And also the estate right title and interest dower, and right of dower property possession claim and demand whatsoever as well in law as in equity of the said parties of the first part of in and to the above described premises and every part and parcel thereof with the appurtenances. To have and to hold all and singular the above mentioned premises together with the appurtenances unto the said party of the second part his heirs and assigns to his own proper use benefit and behoof forever.

20 And the said party of the second part for himself his heirs and assigns does hereby covenant and agree to and with the said John G. Gerber, his heirs executors administrators and assigns as follows: that the party of the second part his heirs and assigns shall not at any time hereafter erect or cause procure permit or suffer to be erected upon the hereby granted premises or any part thereof except, as hereinafter provided any building other than a dwelling house to cost not less than Four thousand dollars and which is to be at least two stories with attic in height and is to be arranged for not more than two families or which may be constructed of brick and arranged in apartments and is then to be not less than three stories in height and to be arranged for not more than three families and if of brick and arranged in apartments shall be constructed with frontal dressed brick on the side of the building facing the street upon which the above described premises front nor

place or cause procure permit or suffer to be placed the front or exterior line of any part of said building so erected nearer than ten (10) feet to the line of the Street in front of the above described premises and that the party of the second part his heirs and assigns will at the time of the erection of any such building connect or cause the same to be connected with the sewer built in the Street in front of the above described premises; and that the said party of the second part his heirs and assigns will not at any time hereafter erect or cause procure permit or suffer to be erected upon the rear of the lot or lots hereby conveyed or any of them any building to be used or occupied or for the purpose of being used or occupied as a dwelling house or habitation, or any other building or buildings whatsoever excepting only that a private stable barn or shed to be used in connection with the dwelling house upon said premises may be erected upon the rear end of the lot or lots hereby conveyed; nor at any time hereafter erect or cause procure permit or suffer to be erected on the premises hereby conveyed or any part of them any building or buildings to be used or occupied or for the purpose of being used or occupied for any purpose other than residential purposes nor at any time use or employ or cause procure permit or suffer to be used or employed by his heirs or grantees lessees or tenants of said premises or any part thereof or by any other person holding possession of said premises or any part thereof under his title any building erected or which may at any time hereafter be erected upon said premises or any part thereof for any purpose other than residential purposes provided however that nothing herein contained shall prevent the said John G. Gerber his heirs executors administrators and assigns from

10

20

30

40

selling the lots as laid out on the map above referred to and fronting on the Bulls Ferry Road free and clear of the above restrictions for store purposes for the sale of merchandise generally but not for manufacturing purposes.

10 And it is expressly understood and agreed that the said several covenants on the part of the said party of the second part, to be performed shall attach to and run with the land until the first day of May in the year One thousand nine hundred and twenty. And the said John G. Gerber for himself and his heirs executors and administrators does covenant grant and agree to and with the said party of the second part his heirs and assigns that the
20 said John G. Gerber at the time of the sealing and delivery of these presents is lawfully seized in his own right, of a good absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted bargained and described premises with the appurtenances and has good right full power and lawful authority to grant bargain sell and convey the same in manner and form aforesaid;

And that the said party of the second part his heirs and assigns shall and may at all times hereafter peacefully and quietly have hold use occupy
30 possess and enjoy the above granted premises and every part and parcel thereof with the appurtenances without any let suit trouble molestation eviction or disturbance of the said parties of the first part their heirs or assigns or any other person or persons lawfully claiming or to claim the same.

And that the same now are free clear discharged and unencumbered of and from all former and other grants titles charges estates judgments taxes assessments and encumbrances of what nature and
40 kind soever. And also that the said parties of the

first part and their heirs and all and every other person or persons whomsoever lawfully or equitably deriving any estate right title or interest of in or to the hereinbefore granted premises by form under or in trust for them shall and will at any time or times hereinafter upon the reasonable request and at the proper costs and charges in the law of the said party of the second part his heirs and assigns make do and execute or cause to procure to be made done or executed all and every such further and other lawful and reasonable acts conveyances and assurances in the law for the better and effectual vesting and confirming the said premises hereby intended to be granted in and to the said party of the second part his heirs and assigns forever as by the said party of the second part his heirs or assigns or his or their counsel learned in the law shall be reasonably advised or required.

10

20

And the said John G. Gerber his heirs the above described and hereby granted and released premises and every part and parcel thereof with the appurtenances unto the said party of the second part his heirs and assigns against the said parties of the first part and their heirs and against all and every person or persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents hereby defend;

30

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

JOHN G. GERBER (Seal)

IDA ELIZABETH GERBER (Seal)

Signed sealed and
delivered in the presence of

EDWARD RUSS.

40

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

10 Be it remembered that on this first day of June in the year of our Lord one thousand nine hundred and six before me the subscriber a Master in Chancery of New Jersey, personally appeared John G. Gerber and Ida Elizabeth, his wife, who I am satisfied are the grantors mentioned in the within deed, to whom I first made known the contents thereof and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

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

WARNE SMYTHE,
 Master in Chancery
 of New Jersey.

Received and recorded in the Register's Office,
 June 4, 1906, at 12:28 P. M.

30

Exhibit C-6.

This indenture, made the Twenty-third day of April in the year of our Lord One thousand nine hundred and seven,

40 Between John G. Gerber, and Ida Elizabeth Gerber, his wife, of the Township of Weehawken in the County of Hudson and State of New Jersey parties of the first part; And Anna Muller, wife of

Conrad Muller of the Township of Weehawken in the County of Hudson and State of New Jersey, party of the second part; Witnesseth, that the said parties of the first part, for and in consideration of the sum of Three Thousand (\$3,000) dollars, lawful money of the United States of America to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged; and the said parties of the first part being therewith fully satisfied, contented and paid have given, granted, bargained, sold, alienated, released enfeoffed, conveyed and confirmed and by these presents, do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to her heirs and assigns, forever; All those certain lots, tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the Township of Weehawken, in the County of Hudson and State of New Jersey, which upon a certain map entitled Map of property belonging to John G. Gerber, in the Township of Weehawken, Hudson County, N. J., County Block 2175 and filed on the Sixteenth day of February, 1904, in the Office of the Register of the County of Hudson, are known and designated as lots numbered fifty-four (54) and fifty-five (55), situated on the easterly side of the Bulls Ferry Road.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions remainder and remainders, rents, issues and profits thereof.

And also all the estate, right, title, interest dower and right of dower property, possession, claim and

10

20

30

40

demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in and to the above described premises and every part and parcel thereof, with the appurtenances,

10 To have and to hold, all and singular the above mentioned premises, together with the appurtenances unto the said party of the second part, her heirs and assigns, to her own proper use; benefit and behoof forever, and the said party of the second part, for herself her heirs and assigns, does hereby covenant and agree to and with the said John G. Gerber, his heirs executors, administrators, and assigns that she will use said premises for dwelling and store purposes for the sale of merchandise generally, but not for manufacturing purposes, and it is expressly understood and agreed
20 that the said covenant on the part of the said party of the second part to be performed shall attach to and run with the land until May 1st, in the year 1920.

And the said John G. Gerber for himself and his heirs, executors and administrators does covenant, grant and agree to and with the said party of the second part her heirs and assigns, that the said John G. Gerber at the time of the sealing and delivery of these presents is lawfully seized in his
30 own right of a good absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted bargained and described premises, with the appurtenances and has good right full power and lawful authority to grant, bargain sell and convey the same in manner and form aforesaid; and that the said party of the second part, her heirs and assigns, shall and may at all times hereafter peaceably and quietly have hold, use, occupy, possess and enjoy the above

40

granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said parties of the first part, heirs or assigns, or of any other person or persons lawfully claiming or to claim the same,

And that the same now are free clear discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances of what nature and kind soever; 10

And also, that the said parties of the first part, and their heirs and all and every other person or persons whomsoever lawfully are equitably deriving any estate, right, title or interest, of, in or to the hereinbefore granted premises, by, from, under or in trust for them, shall and will at any time or times hereafter upon the reasonable request and at the proper cost and charges in the law, of the said party of the second part her heirs and assigns, make, do and execute, or cause or procure to be made, done or executed and all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part, her heirs and assigns forever, as by the said party of the second part, her heirs or assigns, or their counsel learned in the law, shall be reasonably advised or required, 20 30

And the said John G. Gerber, for himself and his heirs, the above described and hereby granted and released premises and every part and parcel thereof, with the appurtenances, unto the said party of the second part, her heirs and assigns, against the said parties of the first part, and their heirs, and against all and every person or persons whosoever, 40

lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend,

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

10

JOHN G. GERBER (Seal)
IDA ELIZABETH GERBER (Seal)

Signed, sealed and
delivered in the presence of
EDWARD RUSS.

20

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

30

Be it remembered, That on this Twenty-third day of April in the year of our Lord one thousand nine hundred and seven, before me the subscriber, a Master in Chancery of New Jersey, personally appeared John G. Gerber, and Ida Elizabeth Gerber, his wife, who, I am satisfied are the grantors mentioned in the within deed, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed. And the said Ida Elizabeth Gerber being by me privately examined separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed freely, without any fear, threats or compulsion of her said husband.

40

EDWARD RUSS,
Master in Chancery
of New Jersey.

Exhibits.

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

Be it remembered, That on the first day of May in the year of our Lord one thousand nine hundred and seven, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared John G. Gerber and Ida Elizabeth, his wife, who, I am satisfied are the grantors mentioned in the within deed, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed and the said Ida Elizabeth Gerber, being by me privately examined separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband.

Warne Smythe, Master in Chancery, N. J.

Received in the office and recorded May 3rd, 1907 at 11-19 A. M., No. 3626.

30

Exhibit C-6A.

THIS INDENTURE, made the third day of February, in the year nineteen hundred and sixteen, BETWEEN, JOHN G. GERBER a widower, of the Town ship of Weehawken, in the County of Hudson and State of New Jersey, party of the first part, and CONRAD MULLER, of the Town

40

of West New York, in the County of Hudson and State of New Jersey, party of the second part.

10 WITNESSETH, that the said party of the first part, in consideration of One (\$1.00) Dollar and other good and valuable consideration, lawful money of the United States, paid by the party of the second part, does hereby remise, release and
20 quitclaim unto the said party of the second part, his heirs and assigns, forever, ALL those two certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate lying and being in the Township of Weehawken, in the County of Hudson and State of New Jersey, which upon a certain map entitled "Map of property belonging to John G. Gerber, in the Township of Weehawken, Hudson County, N. J., County Block 2175" and
30 filed on the fifteenth day of February, 1904, in the office of the Register of the County of Hudson, are known and designated as lots numbered fifty-two (52) and fifty-three (53).

It being the intention of this deed to convey to the party of the second part, the premises herein described, free, clear and discharged from that restrictive covenant contained in a certain other deed made by John G. Gerber and Ida Elizabeth Gerber, his wife, dated June 1st, 1906 and recorded June
40 4th, 1906 in the Hudson County Register's Office in book 940 of Deeds at pages 537, etc., which reads as follows:

"AND the said party of the second part for himself, his heirs and assigns, does hereby covenant and agree to and with the said John G. Gerber, his heirs, executors, administrators and assigns as follows: that the party of the second part, his heirs and assigns shall not at any time hereafter erect

or cause, procure, permit or suffer to be erected upon the hereby granted premises or any part thereof except as hereinafter provided, any building other than dwelling house, to cost not less than four thousand dollars, and which is to be at least two stories with attic in height, and is to be arranged for not more than two families, or which may be constructed of brick and arranged in apartments and is then to be not less than three stories in height, and to be arranged for not more than three families, and if of brick and arranged in apartments, shall be constructed with frontal dressed brick on the side of the building facing the street, upon which the above described premises front; nor place or cause, procure, permit or suffer to be placed, the front or exterior line of any part of said building so erected nearer than ten (10) feet to the line of the street in front of the above described premises; and that the party of the second part, his heirs and assigns, will at the time of the erection of any such building, connect or cause the same to be connected with the sewer built in the street in front of the above described premises; and that the said party of the second part, his heirs and assigns, will not at any time hereafter, erect or cause, procure, permit or suffer to be erected upon the rear of the lot or lots hereby conveyed or any of them, any building to be used or occupied, or for the purpose of being used or occupied as a dwelling house or habitation, or any other building or buildings whatsoever, excepting only that a private stable, barn or shed to be used in connection with the dwelling house upon said premises, may be erected upon the rear end of the lot or lots hereby conveyed; nor at any time hereafter erect or cause, procure, permit or suffer to be erected

10

20

30

40

- on the premises hereby conveyed or any part of them, any building or buildings to be used or occupied or for the purpose of being used or occupied for any purpose other than residential purposes, nor at any time use or employ or cause, procure, permit or suffer to be used or employed by his heirs or grantees, lessees or tenants of said premises, or any part thereof, or by any other person holding possession of said premises or any part thereof, under his title, any building erected or which may at any time hereafter be erected on said premises, or any part thereof for any purposes other than residential purposes, provided however, that nothing herein contained shall prevent the said John G. Gerber, his heirs, executors, administrators and assigns from selling the lots as laid out on the map above referred to and fronting on the Bulls Ferry Road, free and clear of the above restrictions for store purposes for the sale of merchandise generally, but not for manufacturing purposes.

AND it is expressly understood and agreed that the said several covenants on the part of the said party of the second part to be performed, shall attach to and run with the land until the first day of May, in the year one thousand nine hundred and twenty."

It being the intention to release and discharge lots fifty-two (52) and fifty-three (53) in the aforesaid deed from the operation and effect of the restriction aforesaid, inasmuch as lots fifty-two (52) and fifty-three (53) face Bulls Ferry Road, and it never having been the intention that the premises facing Bulls Ferry Road should be so restricted, but that the restriction should simply apply to

premises facing Sixth Street, and therefore, the aforementioned restriction should cover and bind lot fifty-six (56) in the aforesaid deed, only, as lot fifty-six faces Sixth Street.

Together with all and singular the tenements, hereditments and appurtenances thereunto belonging, or anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. 10

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 above described premises, and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD, All and singular, the above mentioned premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, to their own proper use, benefit and behoof forever. 20

IN WITNESS WHEREOF, The said party of the first part has hereunto set his hand and seal the day and year first above written.

Signed, Sealed and Delivered
in the presence of 30
ISADOR HABER.

JOHN G. GERBER (L. S.).

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

10 BE IT REMEMBERED, That on this 3rd day of February, in the year One Thousand Nine Hundred and Sixteen, before me, the subscriber, an Attorney at Law of the State of New Jersey, personally appeared JOHN G. GERBER, who, I am satisfied, is the grantor mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

20

ISADOR HABER,
 Attorney at Law of the
 State of New Jersey.

(Documentary Stamps.)

30

40

235

Exhibit P-1.

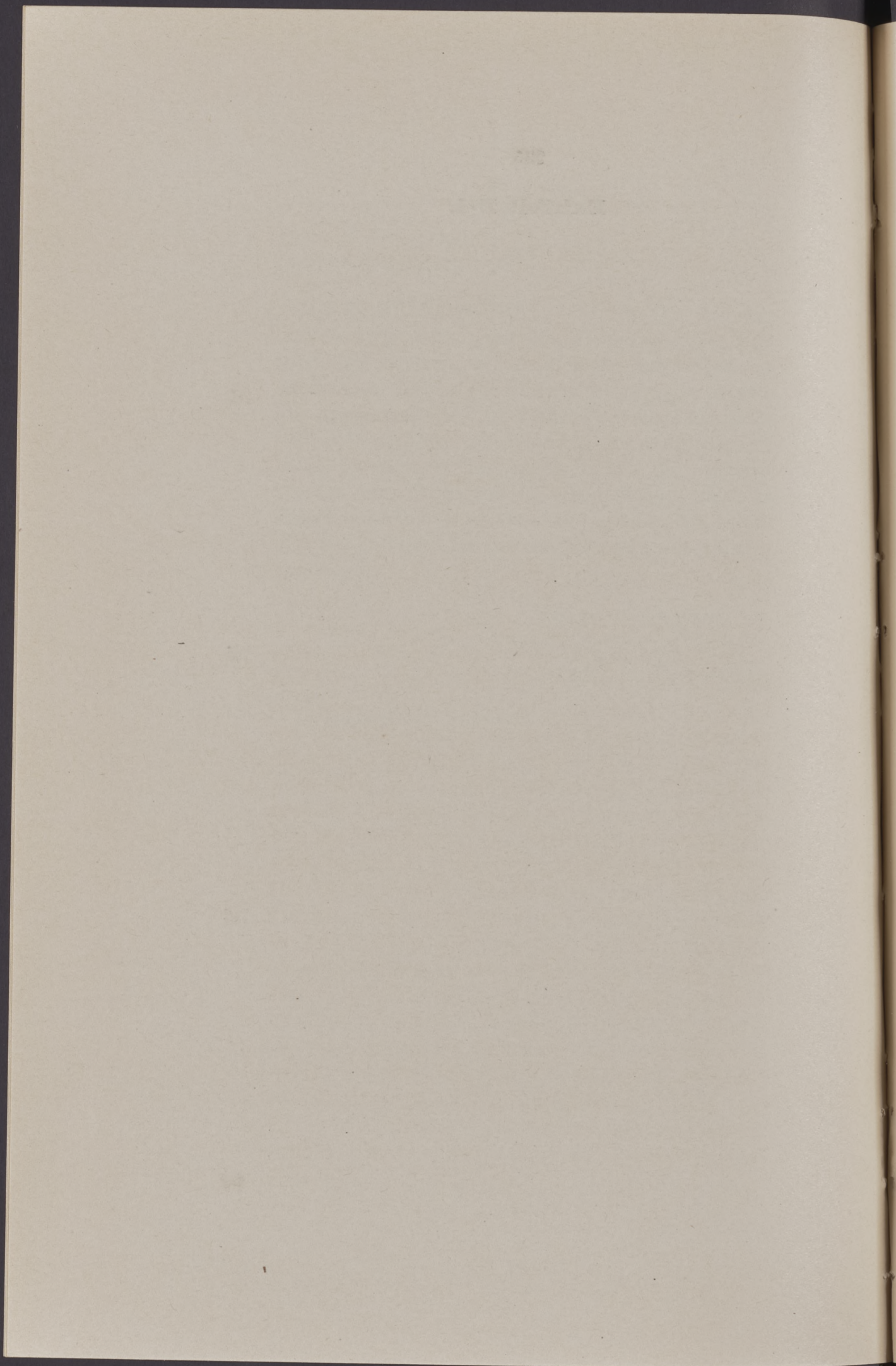


Exhibit Weller 1.

IN CHANCERY OF NEW JERSEY.

Between:

CONRAD MULLER, et ux.,
 Complainants,
 and
 NATHAN WEISS, et ux.,
 Defendants.

On Bill, etc. 10
 Affidavit.

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

Nathan Weiss, of full age being duly sworn on his oath deposes and says, I am one of the above named defendants. Mr. Hill Haber submitted to me an offer to exchange property by the complainants with me on or about the 22nd, day of December, 1915. While we were negotiating for the exchange Mr. Muller showed me a blue print of a large apartment house which he said had been prepared by DeRiso Bros., and he said he had one time intended to build an apartment house to cover the entire plot. On December 23rd, 1915, I went with Mr. Haber to the home of the complainants and while there we fixed the price at which each of the properties was to be considered in the exchange. After the price had been fixed Mr. Hill Haber said that he would send for his son, Isador Haber, who is an attorney, and he would prepare a contract. I inquired of Mr. Muller what it would cost to excavate his lots and he said he had one estimate for fifteen hundred (\$1,500.00) dollars. After Mr. Isador Haber came to the house of Mr. Muller

40

and while the contracts were being prepared, I inquired of Mr. Muller as to the size of the lots belonging to him and he informed me that the corner lot was thirty (30) feet wide and ninety-five (95') deep and the other three lots were each twenty-five (25) feet wide and one hundred (100') feet deep. After the contracts were prepared I found on reading them that they referred to restrictions: I asked Mr. Muller what restrictions were on his property and he said, "There are no restrictions except that you could not have any saloon on the premises."

The contract was prepared and the description for the premises which were to be conveyed by me and my wife was taken from two deeds which I had produced and in which the premises consisting of two lots were described as being each twenty-five (25) feet wide and ninety-five (95') feet deep but Mr. Isador Haber described the lots in the contract as being each twenty-five (25') feet wide and one hundred (100) feet deep. I was told after the contract had been signed that the lots to be sold by Mr. Muller were not the full depth which he represented and I inquired of him a second time and he again informed me that the corner lot was ninety-five (95') feet deep and the other lots each one hundred (100') feet deep. I then had my attorneys Dippel & Davis, proceed with the search of the title and I was informed by them that the lots were not the depth represented by Mr. Muller and that there were building restrictions on the corner lot and the lot adjoining. I obtained estimates for the excavation of the cellar of the proposed building which I intended to erect on the lots to be conveyed to me and found that the cheapest price that I could obtain for such excavation was four thousand (\$4,000.00) Dollars. At the

time fixed for closing the title my attorneys called with me at the office of Mr. Isador Haber and I refused to take title, acting on their advice, because of the restrictions and of the shortage in the depth of the property, and because there was no legal tender of the cash required to be paid by the complainant under the contract and because the mortgage which was to have been given by the complainants was only signed by Mrs. Muller, because the deed did not purport to convey all the lands described in the contract and the lands lying in the bed of any street as provided in said contract. On the 21st day of February I was at the office of my attorneys when the complainants and their attorney, Mr. Isador Haber again tendered a deed which recited that the premises were subject to restrictions on record and I refused to take title again because the land described in the deed was not the same as the land described in the contract and is not as represented by the complainants and because it is subject to restrictions not the same as those represented by the complainants.

10

20

There are at the present time no taxes or assessments unpaid or in arrears on the premises owned by me and I have paid the mortgagee who holds the mortgage on my premises the interest which became due on the first day of February, 1916, and there are now no arrears or interest against said property.

30

The premises are covered by insurance policies, the premiums of which have been fully paid and said policies will not expire until about October, 1918.

NATHAN WEISS.

Sworn and subscribed before me
this 28th day of February, 1915.

40

HENRY A. OETJEN,
Notary Public of New Jersey.

29312 6

1882

Received of the Treasurer of the
Board of Education the sum of
\$100.00 for the year ending
June 30, 1882.

Witness my hand and seal this
10th day of July, 1882.

Superintendent of Schools

City of New York

1882

Received of the Treasurer of the
Board of Education the sum of
\$100.00 for the year ending
June 30, 1882.

Witness my hand and seal this
10th day of July, 1882.

Superintendent of Schools

City of New York

1882

Received of the Treasurer of the
Board of Education the sum of
\$100.00 for the year ending
June 30, 1882.

Witness my hand and seal this
10th day of July, 1882.

Superintendent of Schools

City of New York

New Jersey Court of Errors and Appeals 10

Between
CONRAD MUELLER and ANNA
MUELLER,
Complainants-Appellants,
and
NATHAN WEISS,
Defendant-Respondent.

On Bill for
Specific
Performance.
On Appeal.

20

BRIEF OF APPELLANTS.

Statement of Facts.

This is an appeal from a decree advised by Vice-Chancellor Lewis refusing specific performance in an action on a certain contract dated the 23rd day of December, 1915, for the sale of four lots situated on Park Avenue, formerly Bulls Ferry Road, in the Township of Weehawken. in the County of Hudson and State of New Jersey. The contract of sale contained a provision (page 210, line 22) "subject to all restrictions of record in the chain of title." The defendant, admitting he knew of this clause in the contract and that he read it

30

40

(page 80, lines 5 to 10), claims that complainants made certain representations as to the nature and scope of the restrictions. Upon tender being made of the deed defendant objected to the same and refused to carry out the terms of the contract upon the following grounds:

- 10 1. Because of certain restrictive covenants.
2. Because there was a shortage of the land.
3. Because the cost of excavating the lots was in excess of the estimate claimed to have been made by the complainants.

20 The complainants deny that the defendant was misinformed as to the restrictions, or misled or injured by them; and they deny that there was a shortage of the land. The deed used the word "approximately" and "about" in giving the length and breadth of the four lots sold, as one hundred feet frontage and one hundred feet in depth, whereas the lots in fact had a frontage on Park Avenue of about 106 feet, and a depth of from 93.46 feet to 100.55 feet, which would make a greater square foot area than that as given in the contract by 185.63 square feet. And complainants deny that 30 defendant was misled by any statement as to the cost of excavating the property.

 These three objections we are taking up under separate headings in this brief; we shall proceed at once to a discussion of the evidence bearing upon these three objections, convinced as we are, that there is no validity in any of them, and that the evidence is overwhelmingly against them.

POINT I.

There was no shortage in the land contracted for but more than approximated.

The contract (page 205, lines 20 to 28) described the property to be sold as follows: "are known and designated as lots numbered fifty-two (52), fifty-three (53), fifty-four (54) and fifty-five each being *approximately* twenty-five (25) feet wide in front and rear and *about* one hundred feet (100) deep, except the corner lot."

10

By reference to the map the actual length and breadth of the four lots are revealed.

If these lots had been of the size approximated in the deed—100 feet in front for the four lots by 100 feet in depth there would have been just 10,000 square feet; whereas the four lots, as actually measured, contain 10,185.52 feet and a greater frontage by over six feet than as approximated in the contract of sale.

20

It is to be noted that the frontage in each of these lots is greater than the approximated width placed upon them by the contract.

Surely the excess in the frontage more than makes up for any deficiency in depth. And in view of the acknowledgement by the defendant of his familiarity with Park Avenue (formerly Bulls Ferry Road) he must have known that these lots must have had a different depth for it is impossible to plot lots situated in a trapezoid so as to make the depth the same.

30

But the defendant testified (page 88, lines 37, 38. and page 89, lines 1 to 5:

40

"Q. Now, just tell us once more what Mr. Muller said about the size of those lots. A. Mr. Muller said, when I saw in the contract 'about' I said, 'What is there "about?"' He said, 'The corner lot is 30 by 95, and the three inside lots are 25 feet front, 25 feet rear, 100 feet depth.'"

10

Defendant well knew these lots and the street, and said:

"Q. How often did you pass these lots? A. Maybe three times a week, maybe once a month, and maybe once in two months."

20

With the information which he admits that the corner lot was but 95 feet in dept and his knowledge of the shape and angle of the street at that point, it is doing violence to the evidence to conclude otherwise than that this objection was presented by a party who is very anxious to be relieved of his contract obligation. This conclusion is inevitable when we consider the endeavors of the defendant to pay the plaintiffs if they would release him.

30

Mr. Muller's testimony bears a very favorable contrast to that of the defendant, where he says:

"Q. What was said, if anything, about the depth of these lots at that time by Mr. Weiss, at the time you were drawing this contract there? A. Oh, I told Mr. Weiss the lots were not quite 100 feet, the front, was a little over 100 feet on Bull's Ferry Road, and the depth I did not know, because Park Avenue cuts it off slanting; each lot is a little shorter or longer.

40

Q. What did you tell him about the width of the lots? A. Well, a little over 100 feet.

Q. The front of the four lots was a little over 100 feet? A. Yes, sir.

Q. But you did not know just exactly how much? A. No, sir."

Defendant cannot be relieved unless there were *material* misrepresentations, and if it could be held that the particular shape of this property was not exactly as a technical reading might sustain, we urgently insist that it is not, in any sense a material misrepresentation. 10

The contract uses the word "about" (page 205, line 26) when stating the depth of the lot; "about 100 feet deep except the corner lot."

The editor in 1 Corpus Juris, page 336, says: "The use of the word (about) negatives the idea that exact precision is intended." So in Mt. Pleasant Coal Co. vs. Delaware R. Co., 200 Pa., 434, 50 At. Rep., 251, the court said "about" as used in a grant to a railroad company of a strip of land "about fifty perches in length" shows that the length was estimated instead of measured. 20

In Co-operative Bank vs. Hawkins, 73 At. Rep., 617, a mortgage described a lot as beginning at a point "about" 315 feet from D. Street and it was held that the word "about" as so used was not an equivalent to "at," but indicated that only an approximation of the distance was intended. 30

In the very recent case of Wadell vs. Phillips, 105 At. Rep., 771, the Court of Appeals of Maryland held that the word "about," when used in a contract of sale, imports a near approximation. It is apparent therefore that there is no shortage in the amount of land contracted to be sold, and

there is a complete absence of any element of unfairness or deception. And surely it can not be claimed that there is any material variance in the descriptions. It is not a technical variance that defeats an action for specific performance, but it must be a *material* variance (3 Elliot on Contracts, page 486; Hallinger vs. Zimmerman, 59
 10 N. J. Eq., 644.

POINT II.

Defendant was not misled by plaintiff's statement as to the cost of excavation.

20 Defendant, an active building contractor, claims that he asked the plaintiff, a butcher, as to the cost of the excavation of the lots and that the butcher told him (the building contractor) that the cost of excavation would be about \$1500, and he, the building contractor, relied upon the butcher's statement as to the cost of excavating rock and to his surprise and loss afterwards learned that the cost of excavating was considerably greater.

The desparation of this defendant to "get from under" is here well exemplified.

30 But the improbability of such a representation is again met with the convincing denial that any instructions by the butcher were given to the building contractor. The plaintiff testified (page 144, lines 18 to 28) :

"Q. What did he say to you at that time or any other time about the excavation there?
 A. He asked me how much that would cost to excavate that, and I said, 'Mr. Weiss, I don't know what that would cost; when I bought

those lots I had a rough guess on it of about \$2000 to \$2500, about; now, of course, it would cost more to dig it out on account of the war, and all the people are away;’ and then Mr. Weiss said he knew that.”

The defendant seeks to be relieved from the absurdity of such a situation and says (page 76, lines 9 to 12): 10

“Mr. Muller said that he had an estimate from two Italians for \$1500; so I said, ‘I will be willing to spend \$2500, if I can get the rock out.’”

When Mr. Muller obtained this estimate from the Italians the defendant did not inform us. He did not ask apparently. He could not have been interested as to when those estimates were received. He wishes to be relieved from his contract and he no doubt concluded that “every little bit helps,” no matter how improbable the story be or what a “web” of “fancies” or “dreams” his story may reveal, the tale of the builder taking lessons from an ignorant butcher must stand. 20

But let us look further. Mr. Hill Haber, the broker, testified that before the sale was consummated and after he had told the defendant the price, etc., the defendant then said (page 179, lines 1 to 4): 30

“I went away with Mr. Weiss, Mr. Weiss say to me, ‘Well, I know the price and everything and I got to find out what the rocks is going to cost to take out.’

“Q. What did Mr. Weiss say to you about the lot? A. Well, he was going to find out

10 what it will cost to take out. There was a whole lot of rocks there and he said he will let me know in a couple of days. And in two or three days I see Mr. Weiss and I say, 'No, I see the people, but I got no price yet.' And I see him again in a couple of days, in three or four days, and he says, 'Well, I don't know yet.' And I see him again and he say, 'Well, I expect to-day I get the price.'

20 "Q. Just an estimate? A. Get an estimate, yes. Well, I say, 'I see you tomorrow.' I see him the next day and he say, 'I know what it is going to cost me,' and he said between four thousand and forty-five hundred dollars. That is what he said to me. Then he talked about the price and he asked his price, forty-eight thousand dollars, and he had offered him less, and we talked around about the price and he come down in his price from the property and I brought him down there to Mr. Muller's house.

"Q. When was this, how long before Christmas, about? A. That was about Tuesday, a week before Christmas."

30 This took place before the contract was signed, so the defendant knew at the time of the execution of the contract what the estimate was, and the estimate he then had did not differ from the estimates thereafter had by the defendant. The defendant testified on his direct examination (page 77, lines 9 to 14):

"A. Rob Emmer told me it would cost between \$4,500 and \$5,000; and Joe Rossett, a little over \$4,000; and Horning said he would have to measure it out first but it would cost

every bit between four and five thousand dollars.”

And William Puck testified (page 120, lines 10 to 20) that he saw the defendant Weiss walking around the lots three weeks before Christmas, which bears out the testimony of Mr. Hill Haber, and it was the natural thing to expect.

10

Here the defendant, an experienced and active builder, concerned in the purchase of property upon which he intended to build an apartment house, wishes us to believe in contradiction of several witnesses that before he contracted to buy he did not have estimates from competent people as to the cost of excavating the lots or at least knew what the approximated cost would be. We submit such a conclusion would do violence to the evidence before us.

20

POINT III.

Defendant was neither misinformed, misled nor injured by the insertion in the contract of the clause, “subject to all restrictions of record.”

The contract for the purchase of the four lots contains the following provision (page 205, lines 34 to 36): “Said premises which are to be conveyed by the parties of the first part are to be conveyed subject to the following incumbrances * * *” and (page 206, line 12), “All restrictions and covenants of record.”

30

It is this provision and the circumstances surrounding its inclusion in the contract that the defendants rely upon principally to defeat this action for specific performance.

40

Defendant admits that he read the contract before it was signed by him (page 73, lines 34, 35), "Q. When these contracts were written up did you read them? A. Yes, sir." And he further admits that this very provision was discussed by him, and that it was from the discussion of it that he claims he was misled as to its scope and effect.

10 Defendant testified (page 73, line 39) that he asked one of the complainants, Mr. Muller, before signing the contract, what restrictions there were upon the property and that Mr. Muller replied, "There were no restrictions only you darsn't have a saloon there." This is denied by Mr. Muller, and Mr. Muller's testimony is sustained by the three other persons present at the time the statement is alleged to have been made.

20 We shall discuss this point under the following subheads:

1. A brief analysis of the history of the restrictions affecting this property.
 2. Whether or not the misrepresentation as claimed or any misrepresentation was made.
 3. The effect of the insertion in the written contract of the clause making the title subject to all
- 30 restrictions of record.

The Restrictions.

There are two sets of restrictions affecting this property. Complainants' title to these four lots Nos. 52, 53, 54 and 55 arose out of two different deeds. The deed first obtained conveyed to complainants lots 52 and 53. These two lots as well

as the other two lots front on Park Avenue formerly known as "Bulls Ferry Road." The original grantor of all these lots owned a tract of land which he subdivided. The tract fronted on different streets. The tract owner created certain building restrictions for the entire tract. But the restrictions for the tract differed. Those lots fronting on Sixth Street had numerous restrictions while the lots fronting on Park Avenue (formerly known as Bulls Ferry Road), had practically no restrictions except that manufacturing was not to be permitted. 10

When the complainants purchased the first of the lots, Nos. 52 and 53, they at the same time and in the one deed purchased lot 56, which lot 56 was immediately adjoining and in the rear of lots 52 and 53, but lot 56 faced on Sixth Street. Hence when the scrivener, Mr. Warne Smyth, drafted the deed he inserted in it apparently to save the making of two deeds but inadvertently the long restrictions applicable only to the Sixth Street lots. 20
The facts above are testified to by Mr. Gerber, the original owner of the tract and the creator of the reservations (see pages 117, 118), and see blueprint (page 217). Therefore, when these first lots No. 52 and 53 were purchased, the recorded deed shows that they had not the restrictions which lots facing Park Avenue should have, but the restrictions applicable to the Sixth Street lots. 30
The lots facing on Park Avenue had all been sold to different purchasers, in none of which were the Sixth Street restrictions inserted (see Mr. Dippel's testimony, pages 100-101).

After this plain error was discovered by the title searcher, Mr. Gerber, the grantor and original owner, executed in due form a release in the form of a deed, fully discharging the lots 52 and 53

- from the restrictions so erroneously placed upon them; which deed was shown to defendant and the effect and contents of it were explained to him. We submit that this release completely disposes of the Sixth Street restrictive clause. No buyer of lots either on Sixth Street or Park Avenue could complain or make any objections, for all of the
- 10 deeds to the Sixth Street property contained a proviso (see Mr. Dippel's testimony, page 111, lines 5 to 18) that the grantor reserved the right to sell the Park Avenue lots without any of the restrictions except that the Park Avenue lots should not be used for manufacturing. They could raise no objection for a further reason that the lots on Park Avenue had then practically all been sold with no restrictions except the manufacturing restrictions. No one could claim the benefit of a restriction ap-
- 20 plicable only to two lots in a large tract on a different street when all the other lots on that street had been sold without restrictions. No one could claim to rely upon the creation of a building scheme, as building plans or schemes rest on contract and here there is a total absence of any intention or purpose to create any obligation between the grantor or grantee, and third persons cannot rely upon a status or condition which does not exist in law.
- 30 So we repeat, all we are concerned with are the proper restrictions applicable to the Park Avenue lots. Whatever objections defendant may urge must be against those restrictions which are set out in full on page 226, lines 7 to 24, which restrictions amount to no more than this: that no manufacturing shall be carried on on those Park Avenue lots. Lots No. 52, 53, 54 and 55 all face on Park Avenue and are subject to the restrictions applicable to lots situated on that street and to none others.
- 40

In *Leaver vs. Gorman*, 67 Atl., 111, the late Vice-Chancellor Stevens said (page 112):

“The original grantor in imposing the covenant upon the grantee either may or may not bind himself. If he does not bind himself, then his grantee, having no right of action against him, cannot pursue any other grantee to whom he may subsequently convey the whole or a part of the remaining lands. In the case of the lands in question Mr. Bradley chose to remain unbound. In none of the multitude of deeds offered in evidence does it appear that he covenanted to impose the restrictions in question upon the lands remaining in his hands.”

10

The defendant testified (page 92, line 39):

“If you could have put up an apartment house, you would have taken it? A. Yes, sir.”

20

He was not concerned about manufacturing restrictions. As he testified elsewhere (page 87, line 34) he had never erected a factory.

The restriction gives the right to erect buildings thereon for dwelling purposes (page 226, line 16). The word “dwelling,” as used in the restrictions, includes apartment houses. It has been so held in *Mason vs. People*, 26 N. Y., 200; *Smith vs. Birmingham W. Co.*, 104 Ala., 315; *Levey vs. People*, 19 Hun, 383.

30

In *Kitching vs. Brown*, 180 N. Y., 414, Justice Werner discusses at length the question of whether an apartment house was covered by a restriction much stronger than the restrictive clause before us, and held that the restriction did not cover the erection of apartment houses.

40

To make restrictions effective against the erection of apartment houses it was necessary to use the word "private" dwelling house (*Skillman vs. Smatheurst*, 57 N. J. Eq., 1.

10 There is no restriction against the erection of apartment houses. He was then, if we are to accept his testimony, wrongly advised as to the legal effect of the restrictions. But wrong legal advise does not constitute a defense to this action.

The Alleged Misrepresentations.

20 The defendant testified (line 74, line 1 to 2) that when the clause making the title subject to all restrictions was brought up that the complainant, Mr. Muller, said there are no restrictions except that he, Muller, had heard that saloons were not allowed. This statement the defendant claimed was made at the time the contract was being written and before it was executed. And he further testified, and it is not contradicted, that there were present at that time other than the defendant, four persons, Mr. and Mrs. Muller, the complainants, Mr. Hill Haber, the real estate broker, and the attorney, Isador Haber, Esq., who was preparing the contract. Every one of those four persons denied
30 that Mr. Muller said the only restriction was as to the saloon.

Mr. Isador Haber testified (page 46, line 14), that at that time he was representing both parties. Being asked what Mr. Muller said he answered (page 62, lines 35 to 39):

"Mr. Muller said, 'I don't know what restrictions are on it, I heard that I could not put a saloon there'"

Mr. Muller testified (page 142, lines 30 to 40):

“Q. Before the contract was signed, was anything said about restrictions? A. Yes, sir, he asked me about restrictions, and I told him that I did not know anything about the restrictions at all.

Q. You told him you did not know anything about it? A. No, sir, only that I heard that Weehawken would not allow them to put a saloon in. 10

Q. Did you tell him there were no restrictions on there? A. No, sir.”

Mr. Hill Haber testified (page 178, lines 27 to 31):

“Then he asked me if there were any restrictions there and Mr. Muller said that is what he heard, that a saloon daresn't come in there, and Mr. Weiss said. ‘I don't care, I won't put any saloon.’” 20

As against these four witnesses the defendant claims his story should be believed. We submit that such an *ipsi dixit* has never been allowed to defeat the plain terms of a written contract where there is nothing to corroborate this defendant's story. And there is nothing resembling a corroboration in the record. If it be claimed that attorney Haber should have read the restrictions contained in the deed then before him, we submit that there is no evidence here that Mr. Haber then knew that the deed contained any reservations. And, moreover, Mr. Haber was then acting for the defendant at least as much as he was representing the complainants. 30

Mr. Weiss testified (page 90, lines 1-2), that the reason he did not read the deed was that he had an attorney, (Mr. Haber) to represent him.

10 The defendant was a business man doing extensive building in the locality in which this property was located; he well knew then of the various kinds of restrictions that encumbered the property in this locality. On being asked (page 89, line 38), as to how many properties he ever bought, he replied, "A number of them."

Equity does not relieve a defendant in a suit for specific performance for complainant's failure to tell him of the things he already knew. Nor will it make contracts.

In *Krah vs. Wassmer*, 75 Eq., at pages 113 and 114 (affirmed in 78 Eq., 305), Vice Chancellor Howell said:

20 "It is also urged that the defendant's vendors intended that certain restrictions should be part and parcel of the contract, and that they were omitted from it and from the deed by mistake. * * * the circumstances of this case do not indicate that the vendors acted under any misapprehension of fact whatever. They rather show that if any term was omitted from the contract it was the result of their own negligence and not of mistake, and it is 30 well settled that this court will never relieve a party from the consequence of his own negligence."

No request has been made to reform this contract; in fact, this contract being executory, it could not be reformed. *Wirtz vs. Guthrie*, 81 N. J. Eq., 279. No claim is made that it does not speak the deliberate mind of the parties. The only fault with it is it speaks too plainly.

As was very recently decided in New York in *Erickson vs. Erickson*, 172 N. Y. Supp., 643: specific performance of a written contract will be granted where the objections thereto are technical and the relief prayed for is just and equitable, and carries out the obvious intention of the parties.

The weird story of defendant is grossly insufficient, but if we are to believe his testimony it showed a deliberate refusal to have altered or limited the clause which exempted "all restrictions of record." He signed the contract after its contents were made known to him. It is evident from the record that no request has been made to reform the contract. 10

The parol evidence offered cannot be allowed to contradict the plain clause in the written contract, making the title subject to all restrictions of record. 20

In the leading case in this state, *Van Syckle vs. Darrymple*, 32 N. J. Eq., 235, on the parol evidence rule, or, as Professor Wigmore is pleased to term it, the rule of integration, Vice Chancellor Van Fleet said:

"When the parties to a contract have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of their engagements, it is conclusively presumed that every act of their contract was reduced to writing, and all oral evidence, therefore, of what was said during the negotiation of the contract, or at the time of its ex- 30

ecution, must be excluded on the ground that the parties have made the writing the only repository and memorial of the truth, and whatever is not found in the writing must be understood to have been waived and abandoned."

10 "Even fraud * * * which does not go to the extent of completely overthrowing the instrument, can only be made available to a defendant in a foreclosure suit by cross-bill."

Ibid.

20 Before we proceed to discuss the position of this rule in an action of specific performance, let us understand the true situation. The defendant accompanied by his broker, Mr. Hill Haber, went to the home of the complainants, Mr. and Mrs. Muller. There they discussed the relative rights and value. Late they came to terms and Isador Haber, the son of the real estate broker, was sent for to prepare the contract. In the course of writing the terms the question of the terms of payment having been written out, the question then arose as to the restrictions. But whatever was said it was all said before the contract was signed. We then have a contract signed after the restrictions had been discussed, and after they had been read by the defendant (page 73, lines 34, 35).

30 In this situation before us, taking defendant's story for the moment to be true (it is not to be denied that the great weight of the evidence is against the defendant as both complainants and both of the Habers deny the truth of the defendant's story), can the parol evidence amounting to nothing more than the *ipsi dixit* of the defendant, defeat the plain terms of this contract? If it ever has been done we have not found the case and know no principle of law that will sustain it.

40

The Court of Errors and Appeals has said no. Professor Wigmore says no. And every principle of evidence applicable to written contract says, no.

In *King vs. Ruckman*, 21 N. J. Eq., 605, which was an action for Specified Performance, and defendants sought to show by parol that time was the essence of the contract, the court said:

10

“Parol evidence of conversations between the parties at and before the execution of the contract, is not admissible to alter, add to, or vary the terms of the written instrument, and thus render it a contract of which time is of the essence.”

Professor Wigmore discusses the exception to the parol evidence rule arising out of fraud and shows clearly that the reason why parol evidence is allowed in cases of fraud to contradict the terms of a written contract is one of the parties' state of mind.

20

Here is what he says (Wig. on Ev., sec. 2439):

“When a transaction has been reduced to a single document, how is it that fraud can be established extrinsically? *A simple answer seems to be that since the present rule depends on the intent of the parties to embody one or more subjects of transaction exclusively in the document, it is impossible to suppose that the subject of fraud was intended thus to be covered, since by hypothesis the party upon whom the fraud is practised does not know of it, and therefore could not have had such an intent. But, if this be true, what becomes of that other application of the rule, well estab-*

30

40

lished for most transactions that warranty-representations extrinsic of the document cannot be availed of? Fraud is always a matter of false representations; and how is it that extrinsic representations are as warranties to be ignored but as fraud to be admitted? The explanation seems to be that the vital additional element in fraud is the party's state of mind, which neither can be nor is intended to be embodied in the written document, and that hence the rule does not forbid considering it whenever it is the vital element of the claim. In other words, in an action of deceit, or in a proceeding of rescission of contract wherever this by the law depends upon the promisor's *conscious falsity*, the present rule interposes no obstacle; although in an action of contract upon an alleged warranty as a part of it, or in a proceeding of rescission for breach of warranty or *innocent misrepresentation*, the same representations could not be considered."

Where, then, there is an absence of a state of mind to defraud or misrepresent, parol evidence cannot be allowed by contradict the terms of the written instrument. Hence an innocent misrepresentation (and we submit that nothing more can be claimed under the broadest interpretation of Mr. Muller's statement as testified to by the defendant than that it was entirely innocent) cannot be admitted to defeat this written contract.

"Presumption is always in favor of good faith, of innocence and of honesty."

12 R. C. L., 424.

"Proof required of a fraud must always be of the clearest and most convincing nature."

4 Wigmore on Ev., sec. 2498.

4 Pom. on Eq. Jurisp., 1523.

Where the intention is absent, therefore, whether we call it fraud, or innocent misrepresentation, it cannot be allowed to defeat the plain clause in a written contract.

The learned Vice Chancellor in deciding this case has said it suffices for him to say that he believes there was misrepresentation, innocent misrepresentation though it may have been. Under no rule of law, we humbly submit, can this decision be sustained where as here the contract shows the parties had stipulated for just the objection they now seek to overthrow by parol. 10

An innocent misrepresentation is lacking in that absolutely essential element, which is the "intention." 20

Before parol evidence can defeat a clause in a written contract an intentional fraud must be proved.

All of the cases cited by the Vice Chancellor are cases where the contract was silent as to just the point relied upon to defeat the specific performance. Where there is nothing in writing to contradict, parol evidence in an action for fraud is wellnigh unlimited.

Much has been said about the court's discretion. But such discretion means a judicial discretion, not a mere capricious discretion. 30

Professor Pomeroy well defines it in 4 Pom. on Eq. Jurisp., pages 2767, 2768:

"Where, however. the contract is in writing, is certain in its terms, is for a valuable consideration is fair and just in all its provisions, and is capable of being enforced with-

10 out hardship to either party, it is as much a matter of course for a court of equity to decree specific performance as for a court of law to award a judgment of damages for its breach. This is the ordinary language of judges and text writers. The term "discretionary" as thus used is, in my opinion, misleading and inaccurate. The remedy of specific performance is governed by the same general rules which control the administration of all other equitable remedies. The right to it depends upon elements, conditions, and incidents, which equity regards as essential to the administration of all its peculiar modes of relief. When all these elements, conditions, and incidents exist, the remedial right is perfect in equity."

20 "Moreover, the objections of defendant amount to an assertion of fraud and proof of fraud, must always be of the clearest and most convincing nature."

4 Wigm. on Ev., sec. 2498;

4 Pom. Eq. Juris., page 1523.

Doubly so should this be when contrary to the plain terms of a written contract.

30 The court is not concerned here with the question of the "market ability of title" or what constitutes such a title. The contract before us eliminates any such consideration for it makes the title subject to all restrictions of record. While equity requires but a slight showing of injustice to stay its hands," yet there must be injustice shown by competent and sufficient evidence.

Rules of evidence and the binding effect of a contract are not set aside because we now appeal to

chancery for relief by way of specific performance. Evidence is here to be weighed and considered as in any other action.

If circumstances are to be relied upon to bolster up the *ipsi dixit* of this defendant we appeal to the record and say there are no circumstances corroborating the defendant's story. The conduct of the defendant in trying to buy his release from this contract on numerous occasions (page 183, lines 1 to 10; page 92, lines 20 to 28), are indicative of a knowledge quite opposite to that now assumed by him. If he would criticise Mr. Isador Haber for not telling him in detail of the restrictions, we reply that Mr. Haber in that transaction was representing him (the defendant) as much as he was representing the complainants. He was in no sense complainants' agent, and was acting in the simple capacity of drafting a contract.

In fact, when Mr. Weiss was asked why he did not look at the deed and see for himself just what restrictions there were on the property Mr. Weiss answered (page 90, lines 1 and 2): "A. I had a lawyer there to represent me." According, then, to his own sworn testimony, Mr. Haber was representing him.

The Vice Chancellor cites as sustaining his holding, certain cases which we humbly beg to claim are not pertinent to the situation before us.

His principal reliance is on the case of *Bawker vs. Cunningham*, 78 N. J. Eq., 458, decided by V. C. Leaming. There the purchaser sought by action for specific performance to compel the defendant-vendor to convey to him a certain parcel of land under a written agreement between them. Defendant resisted the relief sought because the purchaser had represented to her prior to the execu-

10

20

30

40

tion of the agreement that he wished to buy the property to erect a dwelling thereon that would benefit the defendant's remaining property. The evidence disclosed that at the time the contract was entered into complainant had a defined purpose to erect stores on the property. The Vice Chancellor there said (page 460):

10

"I incline to the view that complainant probably did not intend to deceive or mislead defendant and that he probably did not fully realize that his statements were such as to lead defendant to believe that the building which he promised to erect was not to be a building for use as a store; but the fact remains that his statements did create that belief and were such as to naturally and appropriately create that belief upon the part of the defendant."

20

This decision was not appealed and has been cited but once and that upon the general principle, that equity must be satisfied that the claim is fair. But the fact is the contract there was silent as to the fact that stores could not be erected.

30

Could the court have held as it did if there had been in the contract a provision that the purchaser could erect stores on the property and specially where the identical matter now objected to was inserted after it had been discussed?

The Court of Errors and Appeals said "no" in the case of *King vs. Ruckman*, 21 N. J. Eq., at page 605, which was a specific performance case. Professor Wigmore says "no" in 4 Wigmore on Evi., sec. 2439. Fraud taints many things, but an innocent misrepresentation—and it cannot, we submit, be seriously contended under the evidence

40

before us if we are to believe the defendant, that there was any semblance of anything more than an innocent statement of a fact not known to be false but believed to be true which the records thereafter revealed to be otherwise, is never permitted to defeat the plain terms of a written contract.

Another case cited by the learned Vice Chancellor was *Pyatt vs. Lyons*, 51 N. J. Eq., 308. There the purchaser sought to have enforced by specific performance a contract for the sale of a piece of real property which was described in the broker's memorandum as "size of lot 22½ by 129"; the contract thereafter drawn up by the broker-agent described the property as "all that tract and lot of land situate on the corner of Nassau and Wither- spoon Streets and known as the Duryee property No. 90 Nassau Street." 10

The complainant claimed the property to have been 25.5 feet instead of 22½ feet, and claimed the depth to have been 130.8 instead of 129. The title to the extra property claimed by complainant was in dispute and good title to it could not be secured. The Court of Errors and Appeals then said on page 313: 20

"The learned Vice Chancellor reached this conclusion, and determined correctly from the evidence in this case, that this complainant never had any right, in equity, to have a conveyance of a lot of more than the twenty-two feet six inches in width. The defendants offered to convey such a lot, and twice, once in May and again in September, 1892, tendered the deed of March 28th, 1892, containing a proper description of a lot twenty-one feet six inches wide by one hundred and twenty-nine 30

feet deep, on the corner of Nassau and Wither-
 spoon Streets. The complainant refused to
 take any deed unless it gave him a lot twenty-
 six feet five inches in width, and refused to
 pay the balance of the purchase-money unless
 he got a good title to such a lot as would in-
 clude the "narrow strip" of land in Wither-
 spoon Street. * * *

10

The complainant has not presented a case
 which brings him within the above rules, and
 no case has been shown where a Court of
 Equity decreed specific performance after such
 a refusal as complainant admits in this case.
 He refused to perform the contract on his part,
 unless the defendants would do what in equity
 they were not bound to do."

20

There is nothing in this case contrary to our
 contention but is in harmony with it. We tendered
 the deed as called for in the contract.

That case stressed the *description*, so we stress
 the importance of the provision that title was sub-
 ject to all restrictions of record. Defendants are
 not in as strong a position as the buyer was in the
 above case for there he had a contract susceptible
 of construction, but here they rely upon the oral
 testimony of a single witness.

30

The other case cited by the Vice Chancellor
 against us, *Brisbane vs. Sullivan*, 81 N. J. Eq.,
 411, had to do only with a defect of title consisting
 of an outstanding tax sale. The Vice Chancellor
 below had decreed that the seller-defendant should
 convey whatever his interest was, with an abate-
 ment of the consideration based upon the inefficacy
 of the tax sale deed. The Court of Errors and
 Appeals held that this could not be done. But the
 court said, at page 413:

40

“The contract which this decree requires be specifically performed is *materially variant* from the one entered into by the parties.”

In that case there was a failure of title, not so with the situation now confronting us.

The defendant insists that he was misled. We have attempted to show that he was not. But let us admit that defendant thought he was buying a wholly unrestricted property. The utmost effect that this mistake can have is to require this court to consider the contract as if the omitted words had been inserted in the written contract, and if inserted would defendant be entitled to defeat this action? 10

In *McCormick vs. Stephany*, 57 N. J. Eq., 258, Vice Chancellor Grey said at page 261 and 262: 20

“That there was a mistaken omission in the option clause of the lease is, I think, fully proven by the uncontradicted affidavits filed by the defendants, and among them of the typewriter who made the omission. 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 defence in a suit for specific performance. But the utmost effect the proof of the mistaken can have is to require the court to consider the contract as if the omitted words were inserted. It this clause be amended by putting in the omitted words, it does, not, in the present attitude of the case, affect the complainant’s right of performance.” 30

Reading this contract then, with the restrictive clause omitted, could the defendant then object to the deed?

10 The only restriction upon this property was as to manufacturing. The complainants are not to be blamed if defendant's counsel advised him that the property was subject to the Sixth Street re-
 20 strictions, as we have shown elsewhere they were not restrictive of Park Avenue lots. Complainant was not obliged to secure releases from the Sixth Street lot owners or from any other property owners. He secured the release from Mr. Gerber—that was sufficient in law. There were no restrictions on the Park Avenue lots against the building of apartment houses (page 226, lines 8 to 22), for which he wished the property, the sole restriction being against manufacturing, and the apartment
 30 house owners are always benefitted by just such restrictions.

But if it be claimed that the manufacturing restriction was sufficient to defeat this action, we submit it was incumbent upon the defendant to show that such restriction was alive and enforceable. No evidence was offered by the defendant that the neighborhood had not changed and that manufacturing was not being carried on on Park Avenue. A change in the neighborhood releases
 30 the restrictions thereon, so far as the change had taken place.

Complainants proved by Gustav Limouze (page 162, lines 1 to 14), that the neighborhood in which this property was located was a business locality and not residential. Upon counsel for complainant wishing to go further with the proof showing the character of the neighborhood, the Vice Chancellor replied (page 163, lines 18 to 21):

"You have shown it sufficiently. I do not think you need dwell any further on it. I understand about the neighborhood."

It is well established in this state, as elsewhere, that a building scheme must have been actually preserved before it can be regarded as an incumbrance to the title. 10

It was so held in the following cases:

Ocean City Asso. vs. Headley, 62 N. J. Eq., 322.

Zelmar vs. Kaufherr, 76 N. J. Eq., 54.

Ocean City Land Co. vs. Weber, 83 N. J. Eq., 476.

Camovito vs. Matthews, 82 N. J. Eq., 218.

Meaney vs. Stork, 81 N. J. Eq., 210.

Sanford vs. Ker, 80 N. J. Eq., 240. 20

Page vs. Murray, 46 N. J. Eq., 325.

With this change in the neighborhood proved to the conviction of the Vice Chancellor who tried this case, the last defense of defendant disappears.

SUMMARY.

Complainant contends:

1. That the conditions of the contract were fair and the terms thereof were just. 30

2. That instead of there being a shortage there were 185.33 square feet more than the approximated 100 feet square as recited in the contract.

3. That no estimate as to the cost of excavation was made by the plaintiff, or that defendant relied

upon it; or that if made, it did not constitute a valid objection to the enforcement of the contract.

10 4. That as the contract specifically made the title "subject to all restrictions or record" that defendant is bound, and that the clause of a written contract cannot be defeated by parol evidence of an innocent misrepresentation.

5. But that even if it be held otherwise, that as the sole restriction was that manufacturing should not be carried on, that such restriction (1) was waived, (2) that the restriction was dead and unenforceable, as the neighborhood had changed from a residential to a business section.

20 We must respectfully submit that the decision of the learned Vice-Chancellor should be reversed and that complainants have a decree awarding specific performance as prayed for in the petition herein.

WELLER & LICHTENSTEIN,
Of Counsel with and
Solicitors for the Complainants.

NEW JERSEY

Court of Errors and Appeals

Between

CONRAD MULLER and ANNA
MULLER,

Complainants-Appellants,

and

NATHAN WEISS,
Defendant-Respondent.

No. 58, November
Term, 1919.
On Appeal from
Chancery.
Sat below:
Walker, C.
Lewis, V. C.

**BRIEF ON BEHALF OF DEFEND-
ANT-RESPONDENT.**

Complainants-appellants filed their bill in Chancery to obtain a decree requiring defendants to perform an agreement to convey, dated December 23, 1915, and to account for the rents and profits of the property, of which conveyance was sought (Printed Book, p. 4). Attached to the bill of complaint is a copy of the agreement (p. 10), which is printed also as Exhibit C-1 (p. 204). The defendants filed an answer and counterclaim (p. 16), charging misrepresentation by the complainant-appellant Conrad Muller, as to the restrictions on the four lots to be conveyed by Muller and his wife, the size of the lots to be conveyed and the cost of excavating said lots, and prayed a decree to annul the agreement, declare the defendants not bound to perform the same, and

that complainants pay to the defendants all damages sustained by them arising out of said misrepresentation. A replication was filed in due course, praying the dismissal of the counterclaim (p. 27). A final decree dismissing the complainants' bill, with costs, was made on March 24, 1919 (p. 32).

Outline Statement of Facts.

The agreement before the court provided for an exchange of properties: the respondents were to convey lands and buildings, and the appellants vacant lots known as 52, 53, 54 and 55 on map of John G. Gerber property. Two of the lots, 52 and 53, were (with lot 56) conveyed to Conrad Muller by Gerber and wife by deed, dated June 1, 1906 (Exhibit C-5, p. 219). This deed contains an extended covenant by the grantee restricting the uses to which these lots could be put (p. 220), which covenant was to attach to and run with the land until May 1, 1920 (p. 222). The other two of the lots, 54 and 55, were conveyed by Gerber and wife to Anna Muller by deed, dated April 23, 1907 (Exhibit C-6, p. 224). This deed contains a shorter covenant by the grantee (p. 226) to attach to and run with the land until May 1, 1920, in these words: "The said party of the second part, for herself, her heirs and assigns, does hereby covenant and agree to and with the said John G. Gerber, his heirs, executors, administrators and assigns that she will use said premises for dwelling and store purposes for the sale of merchandise generally, but not for manufacturing purposes." In the agreement (Exhibit C-1) it was recited that these four lots were to be conveyed subject to "all restrictions and covenants of record" (p. 12, line 27). Much of the testimony given centers about this expression in the agreement, or relates to the circumstances under which it was inserted. The respondent Weiss on

reading the agreement discovered the expression (p. 73) and asked Muller what the restrictions were; the latter replied "There are no restrictions, only you darsent have a saloon there, and that restriction will run out in four years about a saloon." With the understanding that there was only a saloon restriction he signed the agreement (p. 74, line 27). On the day set for closing the title, the respondent attended with a deed duly executed (p. 78): after a little time the search came in and it disclosed the covenants in the deeds to appellants. The respondent had learned also, prior to the date for closing, that the four lots to be conveyed by appellants were smaller than represented. Another meeting was held February 19, 1916, at which time respondent rejected appellants' title, because of the restrictions, the shortage of land about to be conveyed, the fact that the deed by Mr. Gerber could not release the premises from the claims of his grantees and other objections (p. 107). A third meeting took place two days later, after some changes in the papers had been made by appellants, but the substantial objections remained and the title was not acceptable to respondent (p. 108). The bill of complaint was then filed. The Vice-Chancellor found the defendants had been misled and refused to decree performance.

The Defendants Were Misled.

The defendants were misled in three particulars:

- (a) As to the area of the land contracted to be sold by complainants-appellants.
- (b) As to the cost of excavation.
- (c) As to the covenants restricting the use of the property.

A.

It will be borne in mind that the property to be conveyed by complainants was of great value, \$15,000, for four lots, about \$1.50 per square foot. The statement of Conrad Muller as to the size of these lots was a false statement. He declared the corner lot was 30 x 95 and the three inside lots 25 x 100. This was fixed by the testimony of Nathan Weiss (p. 75) and Henry Hope Vanderbilt (pp. 94, 96). In the contract it was glossed over by the description, "each being approximately twenty-five (25) feet in front and rear and about one hundred (100) feet deep, except the corner lot, "the size of which is not given." It is apparent that there had been a conversation between the parties respecting the size of the lots and that Muller had given the size of the inside lots as 25 x 100 and the size of the corner lot as something different. Muller on direct examination (p. 144) says he told Weiss "the lots were not quite 100 feet, the front was a little over 100 front on Bulls Ferry Road, and the depth I do not know, because Park Avenue cuts it off slanting; each lot is a little longer or shorter."

On cross-examination (p. 148) :

"Q. About the size of the lots were you not paying any attention to that? A. I sold them the way they were there; I never read the deed.

Q. You walked by them every day? A. Yes, sir.

Q. You have not any other property more valuable than that around North Hudson County? A. No, sir.

Q. It was worth \$15,000? A. Yes, sir.

Q. And you want to say now that you do not know the size of the lots? A. I do not know it.

Q. You tried to tell him the size of the lots? A. I told him it was along 90 or 93 or 95 to the last lot."

On the next page (149) he denied the statement made by Mr. Vanderbilt, a "disinterested witness, and at the bottom says Mr. Weiss asked him, "How big are those last two lots, is not there 50 x 100," and on page 150 he states that he told Weiss, "You know how the two lots cannot be 50 x 100 as no lot is alike," and yet in spite of these statements the contract was executed by him to include *three* lots approximately 25 x 100 and a corner lot with dimensions unstated.

Hill Haber, who is deeply interested in having the sale go through, in which event he is entitled to commissions, gives an entirely different version of the conversation between Muller and Weiss. On pages 176-177 he stated that Weiss asked how wide and how deep the lots were:

"and Mr. Muller told him the lots is in the front over a hundred, the corner lot is about thirty and the back is—the front thirty and up on the end the last lot is about a hundred, across Park Avenue it is a little shorter.

Q. How long did he say the shortest was?
A. From ninety up until nearly a hundred. I am not sure. He said about."

Taking the testimony of the witnesses with the contract itself, one cannot escape the conclusion that Weiss was, as he says, assured and understood that the inside lots were 25 x 100 and the corner lot 30 x 95. The area of the lots as represented by Muller is 10,350 feet. The actual area as estimated by appellants is 10,185.52 feet. The difference in value at \$1.50 per square foot is \$246.72, but in

addition the lots are very irregular, a matter of great consequence in the erection of a large building, which was admittedly in contemplation. The whole plot is not a large one, the difference in area as represented and as they actually are is substantial and of much greater moment than indicated by the figures just stated.

On page 3 of appellants' brief, we find this paragraph (lines 18 to 24):

"If these lots had been of the size approximated in the deed—100 feet in front for the four lots by 100 feet in depth there would have been just 10,000 square feet; whereas the four lots, as actually measured, contain 10,185.52 feet and a greater frontage by over six feet than as approximated in the contract of sale."

This is obviously an oversight; the size of the lots is not given or approximated in the deed (Exhibit C-2, pp. 209, 210), but the description is by numbers with reference to the Gerber map; in the contract the size of only three lots is approximated; of the other, the corner lot, no size is given. This corner lot was represented to be 30 x 95 feet, and the area of this (2,850 feet) added to the area of the other three as represented by Muller and as approximated in the contract (7,500 feet), makes an aggregate of 10,350 feet.

B.

The misrepresentation by Muller of the cost of excavation is material under the circumstances.

Muller stated to Weiss that he had figures from two Italians for taking out the rock for \$1500 (pp. 75, 76). After the agreement was made Weiss

ascertained that it would cost from \$4,000 to \$5,000 (pp. 76, 77). This difference is about 20 per cent. of the purchase price of the lots and is clearly substantial. Mr. Muller gives his version of the conversation on page 144 and Hill Haber gives his version on page 178, but this is of little value. When the parties were gathered on one of the occasions fixed for passing title Mr. Muller testifies repeatedly that Mr. Weiss wanted \$500 allowance for excavating the lots. Mr. Weiss testifies that the allowance of \$500 was demanded because of the shortage in the lots, while Mr. Dippel, whose testimony was most carefully given, says that on account of the representations as to the cost of excavating the rock and the shortage, he told Muller's attorney that Mr. Weiss would expect to be compensated for the difference in the value of the land (p. 104). It is apparent that complaint was promptly made of the cost of excavation above that stated by Muller, and that it was under discussion between the parties and their attorneys.

C.

Much of the testimony before the Vice-Chancellor related to the misrepresentation of Muller as to what are referred to generally as restrictions. As a matter of fact, both deeds to the Mullers contain *covenants* by the grantees, and in the agreement Isador Haber, the scrivener, distinguishes between the deed to be made by Weiss and wife and that to be made by Muller and wife, as follows:

Weiss and wife were to convey subject to a mortgage "and all restrictions of record in the chain of title." Muller and wife were to convey subject to a mortgage "and all restrictions and *covenants* of record."

This distinction is important in considering the testimony of Isador Haber, as indicating that he

examined the deed to Muller which he had before him, but in which he testified he did not observe the full page of "restrictions" (pp. 64, 65, and deed to Conrad Muller, page 219, particularly pages 220, 221, 222).

The Vice-Chancellor, who had full opportunity for observation, in his opinion describes this witness' testimony as "astonishing." We might add, incredible.

It is beyond controversy that Mr. Weiss, when the contracts were prepared, observed that the Muller lots were to be conveyed subject to restrictions, and he inquired what the restrictions were. All the witnesses agree as to this (Isador Haber, p. 68, lines 9, 10; Nathan Weiss, p. 73, lines 38, 39; Conrad Muller, p. 142, line 31; Anna Muller, p. 127, lines 11, 12; Hill Haber, p. 178, line 27).

From this admitted fact it is clear that the respondent wanted to know if there were any restrictions and it was important for him to know, because he intended to build upon the property and to erect an apartment house, a garage or factory, whatever he considered best (p. 87), but not an ordinary dwelling house. We assume that the respondent having asked this question in a matter of such large moment expected an answer and that he received an answer. The answer he got, according to Isador Haber (p. 68), was, "I don't know; and I heard that I could not put a saloon on it." Conrad Muller says (p. 142) that he answered that he did not know anything about the restrictions at all, only that he had heard that Weehawken would not allow them to put a saloon in. Anna Muller (p. 127) says the answer was, "I know nothing about restrictions; I only heard a few years ago that we did not dare to build a liquor store there." If these witnesses are correct, Weiss got no information whatever in response to his query.

Nathan Weiss testifies that he received what was really a responsive and satisfactory answer to his question, namely: "There are no restrictions, only you darsent have a saloon there, and that restriction will run out in about four years about a saloon" (pp. 73, 74).

The probabilities, of course, are all with Mr. Weiss, as it is idle to suppose that a business man having asked so important a question would be satisfied with an answer which merely stated that the grantor did not know what the restrictions were.

But Mr. Weiss is not without substantial corroboration. When the parties met to pass the title and respondent was present with his deed ready for delivery (p. 103) and the search was brought in and examined, Mr. Dippel called Isador Haber's attention to the restrictions and said that he could not understand why he (Haber) did not explain what the restrictions were as he had the deed present at the time of drawing the contract and the restrictions were lengthy and could easily have been seen. Mr. Haber replied, "I was busy writing the contract and I did not hear the conversation about the restrictions; if I had heard the conversation I would surely have read the restrictions to them" (p. 104). This, of course, is absolutely contrary to the testimony of Isador Haber. When Mr. Weiss heard all the various restrictions, Mr. Dippel says, "He began to rave; he addressed Mr. Muller and said to him, 'Didn't you tell me that there were no restrictions on the property, but that you could not have any saloon?' and Mr. Muller said, 'Yes, I did, but I didn't know what the restrictions were'" (pp. 104-105).

Mr. Davis, a partner of Mr. Dippel, who made and brought in the search, also testifies to the inquiry made by Weiss of Muller and the latter's failure to deny that he had said that there were

no restrictions except that one could not build a saloon (p. 115).

No one questions the integrity and truthfulness of these two witnesses, and Mr. Weiss' conduct when he heard of the restrictions leaves no doubt as to the effect upon him. The narrative of Mr. Weiss as to restrictions is the only rational one. Mr. Muller's story is beyond belief.

Hill Haber, a fluent and partisan witness for the appellants, interested in getting commissions from both sides, if the deal is consummated (pp. 188-189), blurted out the truth on his direct examination: he does not even pretend that Muller made the statement to which the latter testifies. He volunteers (p. 178) "Then he (Weiss) asked if there were any restrictions there and Mr. Muller said that is what he heard, that a saloon daresent come in there, and Mr. Weiss said, 'I don't care, I won't put any saloon.'" It will be seen from this comparison that Hill Haber's testimony on this point closely follows that of Mr. Weiss and the same construction can be given to it by treating the expression "Mr. Muller said that is what he heard," as meaning all that he had heard, which is a natural meaning, about restrictions. Paraphrasing it, we have Mr. Muller saying that all he had heard about restrictions was that a saloon daresent come in there and Mr. Weiss saying "I don't care, I won't put any saloon." This means substantially the same as Mr. Weiss' statement as to what Mr. Muller said, "There are no restrictions only he daresent have a saloon there." This testimony of Mr. Haber was evidently unsatisfactory to appellants, as we find an effort by leading questions and repetition to get a different statement from him (pp. 181, lines 25 to 30; 183, lines 25 to 30; 184, 185). At last the Vice-Chancellor put the plain question:

“Q. Did you hear any conversation as to what your son was to put in the contract?

Mr. Weller: About restrictions?

The Witness: About restrictions?

The Vice-Chancellor: Don't try to guess at it if you didn't hear it.

A. To put in the restriction that there was no restriction there except there could not be a saloon there. There was no saloon dares to be put in there.”

Much of this witness' testimony is entirely unreliable (pp. 192, 193), but as to the restrictions his support of Mr. Weiss is clear and definite.

The Vice-Chancellor in his opinion comments on the conduct and testimony of Isador Haber, the attorney who testified that he represented Mr. Weiss as well as Mr. Muller at the making of the contract. We will not attempt to quote from his testimony, which should be read in its entirety, but wish to direct attention to pages 46, 47, 64, 68, 69, 78 104.

The Rules of Equity to be Applied.

This Court has repeatedly laid down the rule to be applied in cases like the present. One of the most recent is *Neptune Fisheries Co. v. Cape May Real Estate Co.*, 105 *Atl.*, 212. In that case, as here, it is impossible to say to what extent the price should be reduced, it being incapable of computation from the facts disclosed, but its application is to be pressed most strongly on the misrepresentations which abound in the instant case. Mr. Justice Bergen quotes from *Plummer v. Keppler*, 26 *Eq.*, 481, and later in the course of his opinion, citing *Page v. Martin*, 46 *Eq.*, 585, says:

“The specific enforcement of contract rests in the sound discretion of the court, which is chiefly concerned with the equities of the parties in the particular case under consideration.”

Plummer v. Keppler was decided by an eminent Vice Chancellor and *Page v. Martin* by this Court without a dissenting voice.

In *Pyatt v. Lyons*, 51 *Eq.*, 308, at p. 314, Mr. Justice Abbett, speaking for this Court, gives expression to the same principle:

“The relief invoked is not a matter *ex debito justitiae*; the bill for specific performance is addressed to the extraordinary jurisdiction of a court of equity to be exercised according to its discretion.”

Another late case is *Brisbane v. Sullivan*, 86 *Eq.*, 411, in which *Page v. Martin* is quoted with approval.

In *Bowker v. Cunningham*, 78 *N. J. Eq.*, 458, Vice Chancellor Leaming collated and applied the authorities with great skill and reached the conclusion that specific performance should not be decreed in a case where the representation by the purchaser was that he would build a residence on the land, whereas he intended to erect a store. Further applying the authorities, he held that misrepresentation of a material matter, though unintentional, precluded specific performance in favor of the person making it, and held that the rule that a statement to amount to a misrepresentation must be a positive affirmation of an existing fact and not a mere opinion, promise or statement of intention, could not be invoked against a defense of misrepresentation in a suit for specific performance.

An interesting case cited by the Vice Chancellor is *Baskcomb v. Beckwith*, *L. R. 8 Eq. Cas.*, 100, in which 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.

A recent opinion by that eminent jurist, Vice Chancellor Stevens (*Bartley v. Lindabury*, 104 *Atl. Rep.*, 333), contains this pertinent statement (p. 335):

“The law is well settled that courts of equity will often refuse to enforce the specific performance of an agreement that they would not, on the evidence, set aside. (Citing cases.) There is no rule more clearly established, says Chancellor Zabriskie in *Crane v. De Camp*, 21 *N. J. Eq.* 418, than ‘that upon an application for a specific performance of a contract the court must be satisfied that the claim is fair, reasonable, and just, and the contract equal in all its parts. If these points are not established by complainant, he will be left to his remedy at law.’”

We submit that in the case now under consideration, applying the principles above recited, specific performance should be denied whether the misrepresentations complained of were intended to mislead the defendants or not. It is clear from the testimony that they were misled and that it would now be a great hardship to compel performance of this contract.

**The Misrepresentations Were of
Material Matters.**

We have set forth above the importance of the irregularities of the lots and the shortage in area. No attempt has been made by appellants in the pleadings to provide for a partial performance with compensation, and in *Neptune Fisheries Co. v. Cape May Real Estate Co.* (cited *supra*) no decree for partial performance with compensation can rest upon such a prayer as that in the bill of complaint in this cause.

We have demonstrated also that the excess cost of excavation of the rock was material, the excess amounting to about 20 per cent. of the purchase price.

The misleading statement as to restrictions touched a most material matter. Admittedly there was a restrictive covenant against the use of the lots for manufacturing purposes, the importance of which is apparent. Mr. Weiss did not wish to build a saloon, the only thing restricted in Muller's statement to him, but he did intend and was entitled to be free to build anything else, a garage, a factory or an apartment house (p. 87). Clearly this restriction alone would make the title unmerchantable and the respondent was not obliged to accept such a title.

It will be observed that no attempt has been made in the deed or release made by John G. Gerber to Conrad Muller (Exhibit C-6A, p. 229), or otherwise, to release lots 54 and 55 owned by Anna Muller from the effect of the covenant in the deed to her (Exhibit C-6, p. 224), in which on page 226 she covenants that she will use said premises for dwelling and store purposes for the sale of merchandise generally, but not for manufacturing purposes.

Referring to the other restrictive covenants in the deed to Conrad Muller, we submit that it is impossible to find from the evidence that the other grantees of Mr. Gerber cannot maintain an action in equity to enjoin the building of an apartment house or the maintenance of a factory on lots 52 and 53 embraced in the agreement which appellants seek to have performed.

Under the facts as established and admitted, Mr. Gerber made many deeds which prohibited the building of an apartment house extending from June, 1904, to November, 1910. It is true that in some way, presumably by oversight, one lot (No. 58), and only one, was conveyed without restriction, but the deed for this lot was not recorded until May 19, 1908. Before this deed was placed on record over twenty deeds conveying over twenty-five lots had been made by Mr. Gerber and the rights of the several grantees in these deeds had been fixed (pp. 100, 101). It stands beyond dispute that there was a general scheme of improvement contemplated by Mr. Gerber and that in pursuance thereof over twenty deeds were made before lot 58 was conveyed. In this situation it is impossible to find that the defendants were in no danger of a suit for injunction by some one of the many grantees, notwithstanding the attempt to release by the Gerber deed of February 3, 1916 (Exhibit C-6A, p. 229). Prior to the date of the deed by Gerber to Conrad Muller (Exhibit C-5, p. 219), Gerber had made at least eighteen deeds conveying twenty-three lots with the same restrictions. The rights of the grantees in these several deeds became vested before the deed to Conrad Muller and long before the conveyance of lot 58.

De Gray v. Monmouth Beach Co., 50 N. J. Eq., 329.

Winslow v. Newcomb, 87 *Eq.*, 480.

Wooton v. Seltzer, 83 *Eq.*, 163; affirmed
84 *Eq.*, 207.

*Neptune Fisheries Co. v. Cape May Real
Estate Co.*, 105 *Atl.*, 212.

**The Defendants Were Not Obligated to
Take a Doubtful Title.**

The general rule is stated in 36 *Cyc.*, at page
632:

“In a suit by the vendor to enforce performance of a contract for the sale of land, the vendee will not be compelled to accept the title unless it is a marketable one; that is, one which will not expose him to litigation. To force upon the vendee a title which he may be compelled to defend in the courts is to impose upon him a hard bargain; and this a court of equity, in the exercise of its discretion, will refuse to do, irrespective of the question whether the title is actually good or bad.”

Van Riper v. Wickersham, 77 *Eq.*, 232,
in which, at p. 237, many cases are cited.

Doutney v. Lambie, 78 *Eq.*, 277.

Eisler v. Halperin, 89 *L.*, 278.

Simpson v. Klipstein, 89 *Eq.*, 543.

We respectfully submit that the decree below
should be affirmed.

McDERMOTT & ENRIGHT,
Counsel for Respondent.

© 1911

1

© 1911

1011

1870

1

1870

1870