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BILL OF COMPLAINT.

Filed September 7, 1928.

In Chancery of New Jersey

*To his Honor, Edwin Robert Walker, Chancellor
of the State of New Jersey.* 10

The complainants, Lillie Eckhouse and Elmer Eckhouse, her husband, residing in the City of Newark, County of Essex and State of New Jersey, complaining of the defendant, Berwyn Estates, a corporation, say:

1. That heretofore and on the 26th day of June, 1928, they were and still are the owners of all that certain tract or parcel of land lying and being in the City of Newark, County of Essex and State of New Jersey, more particularly described as follows: 20

Being a plot of ground 50 x 150 feet, more or less, on the westerly side of Osborne Terrace, containing a one-family frame dwelling and four car frame garage, commonly known as 61-63 Osborne Terrace.

2. That on the 26th day of June, 1928, the complainants and the defendant entered into a written contract or agreement of sale, a true copy of which is hereto annexed and made part hereof and is hereby expressly referred to as if herein set forth fully and at length, wherein and whereby the complainants agreed to and with the defendant that in consideration of the sum of twenty thousand dollars (\$20,000) payable as in said agreement more particularly set forth, the complainants would convey to the defendant, its successors or assigns, by deed of warranty free of all encumbrances except those provided for in 30 40

Bill of Complaint—Eckhouse Case.

said contract or agreement, the said certain tract of land and premises described in paragraph 1 of the bill of complaint.

10 3. That the said deed for the premises described in paragraph 1 of said bill of complaint was to be delivered on the 1st day of October, 1928, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, at the office of Lionel P. Kristeller, 810 Broad street, Newark, New Jersey.

4. That said agreement of sale, among other things, provided:

20 "It is understood and agreed by the parties hereto that the party of the second part (defendant) will apply to the Zoning Board or such other board having jurisdiction in the City of Newark, for permission to erect an apartment house upon the within premises and adjoining premises, and it is understood and agreed that if the said application is vigorously prosecuted, that if the permit is denied on or before September 1, 1928, the within contract shall be null and void, and of no effect, and the deposit herein given shall be returned to the party of the second part. In any other event, however, the said contract is to remain in full force and effect."

30 5. That the defendant (party of the second part referred to in said agreement of sale and the preceding paragraph) failed to apply to the Zoning Board or such other board having jurisdiction in the City of Newark, for permission to erect an apartment house upon the premises described herein and adjoining premises, and failed to prosecute said application vigorously and said application for the permit was not denied on or before September 1, 1928.

Bill of Complaint—Eckhouse Case.

6. That prior to October 1, 1928, the date set in said agreement of sale for the delivery of the deed and payment of the purchase price, the defendant rescinded, repudiated and breached its said agreement of sale herein referred to, and on the 4th day of September, 1928, served upon the complainants a notice repudiating said agreement of sale and demanding from the complainants a return of the deposit of five hundred dollars (\$500) paid on the signing of said agreement of sale, copy of which said notice is hereto annexed and marked Exhibit "B" and is hereby referred to as if herein set forth fully and at length. 10

7. That the complainants have in all respects complied with the terms and conditions of their agreement of sale and stand now ready, able and willing to carry out the contract in accordance with its tenor and effect and hereby tender themselves ready and willing to carry out the terms of the aforesaid agreement and to abide the further order of this court in the premises. 20

8. That the defendant have refused and still refuse to comply with the terms and conditions of their said agreement of sale hereinabove referred to.

That your complainants are without adequate remedy in the courts of law and therefore pray: 30

1. That the defendant answer each and every allegation contained in the bill of complaint but without oath.

2. That the defendant may be decreed to specifically perform the articles of agreement made and entered into between the complainants and the defendant on the 26th day of June, 1928, and pay to the complainants the consideration 40

Bill of Complaint—Eckhouse Case.

moneys mentioned in the agreement of sale herein referred to, upon the complainants delivering to the defendant their deed of warranty subject only to such encumbrances as are provided for in said agreement of sale.

- 10 3. That this court grant such other and further relief as to the said court shall seem meet and proper.

And your complainants will ever pray, &c.

Dated September 6, 1928.

LIONEL P. KRISTELLER,
Solicitor for and of Counsel with Complainants.

NOTE.

- 20 Attached to the Eckhouse bill of complaint as Exhibit A is the Eckhouse contract introduced in evidence as Exhibit C. 1; and as Exhibit B the Eckhouse notice introduced in evidence as Exhibit C. 2.

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Answer and Counter-claim—Eckhouse Case.

ANSWER AND COUNTER-CLAIM.

Filed October 4, 1928.

IN CHANCERY OF NEW JERSEY.

Between

LILLIE ECKHOUSE and ELMER
ECKHOUSE, her husband,
Complainants,

and

BERWYN ESTATES, a corpora-
tion,
Defendant.

On Bill, &c.

*Answer and
Counter-
claim.*

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This defendant, Berwyn Estates, a corporation, answering the bill of complaint herein, says that:

1. Paragraph 1 is admitted except in so far as is denied in the following statement: Title to said premises was and is defective and unmarketable in various ways, and is subject to restrictions prohibiting the erection of an apartment house.

2. Paragraphs 2, 3 and 4 are admitted only in so far as they accurately describe, recite or quote the agreement therein mentioned. The balance of said paragraphs is denied.

3. Paragraph 5 is denied.

4. Paragraph 6 is denied except in so far as is admitted in the following statement: Defendant made due and proper and warranted service of the notice annexed to the bill of complaint herein, as Schedule "B."

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Answer and Counter-claim—Eckhouse Case.

5. Paragraph 7 is denied.

6. Paragraph 8 is denied except in so far as is admitted in the following statement: Defendant rightfully refuses to consummate the agreement of sale.

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FIRST SEPARATE DEFENSE.

Title to said premises was and is defective and unmarketable in various ways, and is subject to restrictions prohibiting the erection of an apartment house.

SECOND SEPARATE DEFENSE.

1. The bill of complaint herein was prematurely filed.

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2. The defendant will move at or before the final hearing for a dismissal of the bill of complaint herein for the reason that same was prematurely filed.

By way of counter-claim against the complainants, the defendant says that:

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1. On or about June 26, 1928, complainants and defendant entered into an agreement wherein and whereby complainants agreed to and with the defendant, and in consideration of the sum of \$20,000.00 payable as in said agreement more particularly set forth, to convey to the defendant, its successors and assigns, by deed of warranty, free of all encumbrances except those provided for in said agreement, all those lands and premises more particularly described in said agreement.

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2. Pursuant to said agreement defendant paid to complainants a deposit of \$500.00.

Answer and Counter-claim—Eckhouse Case.

3. Said agreement provided, amongst other things, as follows:

“It is understood and agreed by the parties hereto that the party of the second part will apply to the Zoning Board or such other board having jurisdiction in the City of Newark, for permission to erect an apartment house of five stories upon the within premises, and adjoining premises, and it is understood and agreed that if said application is vigorously prosecuted, that if the permit is denied on or before September 1st, 1928, the within contract shall be null and void, and of no effect, and the deposit herein given shall be returned to the party of the second part. In any other event, however, the said contract is to remain in full force and effect.”

10

4. This defendant applied to the Zoning Board or such other board having jurisdiction in the City of Newark for permission to erect an apartment house of five stories upon the premises described in said agreement, and the adjoining premises, and vigorously prosecuted said application, and said application was denied within the time contemplated by said agreement.

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5. Defendant carefully rescinded said agreement and merely rescinds same.

6. Title to said premises was and is defective and unmarketable in various ways, and is subject to restrictions prohibiting the erection of an apartment house.

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This defendant therefore prays that:

a. Said complainants, Lillie Eckhouse and Elmer Eckhouse, her husband, may answer this counter-claim and each statement herein made.

b. That a decree may be made directing said complainants to repay to the defendant the sum of \$500.00 together with interest and costs and

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Answer and Counter-claim—Eckhouse Case.

its reasonable expenses in examining the title to said premises.

10 c. That said sum of \$500.00 together with interest and costs and defendant's expenses in examining title be impred as a lien upon said premises, and in the event that said complainants do not pay same, that said property be sold to raise and satisfy the amount so due to the defendant.

MARDER & OKIN,
Solicitors of Defendant.

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REPLICATION AND ANSWER TO COUNTER-CLAIM.

Filed October 8, 1928.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>LILLIE ECKHOUSE and ELMER ECKHOUSE, her husband, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>BERWYN ESTATES, a corpora- tion, <i>Defendant.</i></p>	}	<p><i>On Bill, &c.</i></p> <p><i>Replication and Answer to Counter- claim.</i></p>
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The complainants herein join issue on the answer of the defendant.

Answering the counter-claim these complainants say:

1. They admit paragraphs 1, 2 and 3.
2. They deny paragraphs 4, 5 and 6.

Dated October 4, 1928.

LIONEL P. KRISTELLER,
Solicitor for Complainants.

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Bill of Complaint—Mendel Case.

BILL OF COMPLAINT.

Filed September 7, 1928.

IN CHANCERY OF NEW JERSEY.

10 *To the Honorable Edwin Robert Walker, Chan-*
cellor of the State of New Jersey.

The complainants Isaac G. Mendel and Florence Mendel, of the City of Newark, in the County of Essex and State of New Jersey, respectfully show that:

1. On June 27, 1928, complainants entered into a certain agreement in writing with the Berwyn Estates, a corporation of the State of New Jersey, wherein and whereby the complainants agreed to convey all that lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

BEGINNING at a point in the westerly line of Osborne Terrace distant seven hundred feet and fifteen one-hundredths of a foot from the southerly line of Clinton Avenue; thence (1) running north sixty-seven degrees thirty-six minutes west one hundred fifty feet to a corner; thence (2) south twenty-two degrees twenty-four minutes west fifty feet to a corner; thence (3) south sixty-seven degrees thirty-six minutes east one hundred fifty feet to the westerly line of Osborne Terrace; thence (4) along the same north twenty-two degrees twenty-four minutes east fifty feet to the place of BEGINNING. Being lot No. 34 on a map of property of James H. and Robert A. Osborne, surveyed by Francisco & Barkhorn, December 8, 1890; which premises were to be con-

Bill of Complaint—Mendel Case.

veyed by the complainants by a Deed of Warranty, free from all encumbrances, excepting as specifically mentioned in said agreement, on or before October 1, 1928, to the said Berwyn Estates, a corporation, for the sum of twenty thousand (\$20,000.00) dollars, and the said Berwyn Estates, a corporation, agreed to pay to complainants said purchase price of twenty thousand (\$20,000.00) dollars in the following manner:

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\$1.00 At the execution of said agreement;

\$6,500.00 By the complainants conveying said premises subject to two mortgages thereon, totalling the sum of \$6,500.00.

\$999.00 In cash or by certified check on the said date of settlement, when the said Deed of Warranty was to be delivered and title passed to the said Berwyn Estates, a corporation.

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\$12,500.00 Subject to the apportionments mentioned in said agreement, by the said Berwyn Estates executing and delivering to the complainants on the said date of settlement, its bond in the penal sum of double the amount of such calculation, conditioned for the payment of the principal sum thereof, which bond was to be secured by a purchase money third mortgage upon said premises which was to be next in priority to the aforesaid two mortgages totalling the sum of \$6,500.00, which mortgage was to be payable two years after the date thereof and to bear interest at the rate of six per cent. per annum, payable semi-annually; all of which terms and conditions are more fully set forth in said agreement made between the said parties, reference thereto being duly had, a true copy of said agreement being hereunto annexed in Schedule "A" and hereby made part hereof.

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Bill of Complaint—Mendel Case.

2. The said agreement, amongst its terms and conditions, provides as follows:

10 “It is understood and agreed by and between the parties hereto that the party of the second part will apply to the Zoning Board or any other board having jurisdiction in the City of Newark, N. J., for permission to erect an apartment house of not more than five stories and basement in height, upon the within premises and adjoining premises on the south, and it is understood and agreed that if the said application is vigorously prosecuted, and if a permit for the erection of said apartment house is denied on or before September 1, 1928, and the party of the second part shall give written notice to the parties of the first part of the refusal to grant such permit on or before September 2, 1928, the within contract shall be null and void and of no effect, and the deposit of \$500.00 paid upon the signing hereof shall be returned to the party of the second part in full satisfaction of any and all damages, if any, that the party of the second part may be entitled to, and upon the return of the aforesaid deposit, neither of the parties hereto shall have any further rights hereunder, in any other event, however, said contract is to remain in full force and effect.”

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30 3. The said Berwyn Estates, a corporation, did not make immediate application to the Zoning Board or any other board having jurisdiction in the City of Newark, N. J. for permission to erect an apartment house of not more than five stories and basement in height upon the said premises and the adjoining premises on the south, and did not vigorously prosecute said application, and said permit was not denied on or before September 1, 1928, and the said Berwyn Estates did not give written notice to the com-

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Bill of Complaint—Mendel Case.

plainants of any refusal to grant such permit on or before September 2, 1928.

4. On September 5, 1928, the Berwyn Estates, a corporation, served a notice upon the complainant Isaac G. Mendel, alone, a true copy of which notice is hereunto annexed in Schedule "B" and hereby made part hereof, which said notice was given although the Berwyn Estates, a corporation, did not make immediate application for the aforesaid permit nor did it vigorously prosecute said application, nor was such permit denied on or before September 1, 1928, nor was said notice given on or before September 2, 1928 in accordance with the terms and provisions of said agreement set forth in Schedule "A" hereunto annexed and made a part hereof; that by the serving of said notice set forth in Schedule "B," the Berwyn Estates, a corporation, rescinded, repudiated and breached its said agreement of sale set forth in Schedule "A."

5. Complainants have always been ready, willing and able, and now tender themselves ready, willing and able to perform their part of the said agreement, and upon being paid the remainder of said purchase price in accordance with the terms of said agreement, to convey said lands and premises to the said Berwyn Estates, a corporation, by Warranty Deed, duly executed by the complainants.

6. Complainants further say that said Berwyn Estates, a corporation, have at all times refused to carry out that part or parts of the agreement of purchase which they should carry out and consummate.

7. Your complainants show that this court has jurisdiction in the premises and that com-

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Bill of Complaint—Mendel Case.

plainants are without adequate remedy in the courts of law, and therefore pray that:

10 1. That the Berwyn Estates, a corporation, who is the defendant to this suit, may answer this bill of complaint, without oath, and each statement therein made:

2. That the said defendant Berwyn Estates, a corporation, may be decreed to specifically perform the articles of agreement dated June 27, 1928, a copy of which is annexed hereto in Schedule "A," in accordance with its terms, conditions and covenants, and to do and perform all other things as required under and by virtue of the said agreement as this Honorable Court may direct.

20 3. That in case the said defendant Berwyn Estates, a corporation, should within the time limited by this court for such performance of said agreement, fail and neglect upon the tender of said Deed to pay the said remainder of said purchase money as aforesaid, that then and in that event the said sum, together with interest and costs, may be and become a lien upon the said lands and premises in favor of the complainants, and that the said lands and premises
30 may be sold under the direction of this court for the satisfaction of said lien so embraced upon said lands and premises; and in case a deficiency should arise upon said sale, that the said defendant Berwyn Estates, a corporation, may be ordered by this court to pay said deficiency together with interest and the costs to these complainants.

40 4. That a writ of subpoena may issue commanding said defendant to answer this bill of

Bill of Complaint—Mendel Case.

complaint and to abide by such decree as this court may make in the premises.

5. That the complainants may have such further relief as this Honorable Court may deem equitable and just.

DAVID M. LITWIN, 10
Solicitor for and of Counsel with Complainants.

NOTE.

Attached to the Mendel bill of complaint as Schedule A is the Mendel contract introduced in evidence as Exhibit C. 3; and as Schedule B the Mendel notice introduced in evidence as Exhibit C. 5.

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Answer—Mendel Case.

ANSWER.

Filed October 4, 1928.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p style="text-align: center;">ISAAC G. MENDEL and FLOR- ENCE MENDEL, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">BERWYN ESTATES, a corpora- tion, <i>Defendant.</i></p>	}	<p><i>On Bill, &c.</i></p> <p><i>Answer.</i></p>
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This defendant, Berwyn Estates, a corporation, answering the bill of complaint herein says that:

1. Paragraphs 1 and 2 of the bill of complaint are admitted in so far as same accurately describe, recite or quote the agreement therein mentioned. The balance of said paragraphs is denied.
- 30 2. Paragraph 3 is denied.
3. Paragraph 4 is denied except in so far as is admitted in the following statement: Defendant made due and proper service of the notice annexed to the bill of complaint herein, as Schedule "B," upon the complainants.
4. Paragraph 5 is denied.
5. Paragraph 6 is denied and defendant further states that it was entitled to refuse to consummate the agreement in question.

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Answer—Mendel Case.

6. Paragraph 7 is denied.

FIRST SEPARATE DEFENSE.

Title to said premises was and is defective and unmarketable in various ways, and is subject to restrictions prohibiting the erection of an apartment house.

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SECOND SEPARATE DEFENSE.

1. The bill of complaint herein was prematurely filed.
2. The defendant will move at or before the final hearing for a dismissal of the bill of complaint herein for the reason that same was prematurely filed.

MARDER & OKIN,
Solicitors of Defendant.

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REPLICATION.

Filed October 5, 1928.

IN CHANCERY OF NEW JERSEY.

10 *Between*ISAAC G. MENDEL and FLOR-
ENCE MENDEL,*Complainants,**and*BERWYN ESTATES, a corpora-
tion,*Defendant.**On Bill, &c.**Replication.*

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The complainants join issue on the answer of
the defendant.DAVID M. LITWIN,
Solicitor of Complainants.

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TESTIMONY.

IN CHANCERY OF NEW JERSEY.

ISAAC G. MENDEL, and FLORENCE MENDEL,	}	10
<i>Complainant,</i>		
<i>and</i>		
BERWYN ESTATES, a corporation,	}	
<i>Defendant.</i>		
LILLY ECKHOUSE and ELMER ECKHOUSE,	}	
<i>Complainants,</i>		
BERWYN ESTATES, a corporation,	}	20
<i>Defendant.</i>		

Transcript of testimony taken before Hon. Maja Leon Berry, Vice-Chancellor, at the Chancery Chambers, Industrial Building, Newark, New Jersey, on Tuesday, March 19, 1929, at 10 A. M.

Appearances:

Lionel P. Kristeller, Esq., for complainants,
Lilly Eckhouse and Elmer Eckhouse.

David M. Litwin, Esq., for complainants,
Isaac G. Mendel and Florence Mendel.

Aaron Marder, Esq., for defendant.

Elmer L. Eckhouse, direct.

ELMER L. ECKHOUSE, a witness for complainant, being duly sworn according to law, on his oath deposes and says:

Direct examination by Mr. Kristeller.

10 The Court: I assume the making of the contract can be admitted and offered in evidence.

Mr. Marder: Except of course that his hasn't got the five apartments.

The Court: There are two different contracts.

Mr. Kristeller: We offer both contracts in evidence.

20 The Court: They are supposed to be duplicates?

Mr. Kristeller: Yes.

Mr. Marder: In one the word "five" is left out.

Mr. Kristeller: There is an interlineation in one of "five story."

(Complainant's contract marked Exhibit C. 1.)

30 (Defendant's contract marked Exhibit D. 1.)

Direct examination by Mr. Kristeller.

Q Mr. Eckhouse you are one of the complainants in this case and one of the owners of the property, 61 and 63 Osborne Terrace? A Yes.

Q You and your wife signed this agreement to sell to the Berwyn Estates? A Yes.

40 Q Were you ready on September first to convey the property to the Berwyn Estates?

William I. Mendel, direct.

Mr. Marder: September first wasn't the title passing date. October first.

The Court: Objection is overruled.

A Yes.

Q Were you ready to convey the title to the Berwyn Estates on October first? A Yes. 10

Q I show you a paper and ask you if you saw this paper or a copy of it? A Yes.

Q When did you first see that paper? A When I returned from my office about five o'clock on the evening of September 4th.

Mr. Kristeller: I offer this notice in evidence.

(Marked Exhibit C. 2.)

Mr. Marder: No cross examination. 20

Mr. Kristeller: That is all.

WILLIAM I. MENDEL, being duly sworn according to law, on his oath says:

Direct examination by Mr. Litwin.

Mr. Litwin: I offer in evidence the contract in our case. 30

(Marked Exhibit C. 3.)

Q Were you the owner of property, 57 and 59 Osborne Terrace, Newark, New Jersey? A Yes.

Q And were you ready on September 1, 1928 and at all times since that date to convey property at 57 and 59 Osborne Terrace to the Berwyn Estates? A I was. 40

Discussion.

The Court: In accordance with the terms of this contract?

The Witness: Yes.

Q I show you two notices and two envelopes and ask you whether you ever saw them before?

10 A Yes.

Q When did you first see them? A On the morning of the 5th of September.

Q What was in the envelopes? A These two notices (indicating).

Mr. Litwin: I offer the notices in evidence and the envelopes.

(Marked Exhibit C. 4, C. 4A and Exhibit C. 5 and C. 5A.)

20 Mr. Marder: No cross examination.

Mr. Kristeller: I will ask Mr. Eckhouse whether he is ready and willing to convey now.

Mr. Marder: I will assume that he is.

Mr. Litwin: We rest.

30 Mr. Marder: I would like to ask your Honor's ruling on these questions. When these defects were pointed out, does your Honor rule that the burden is on the defendant to show the defects, or on complainant, to clear them up.

The Court: Not only is the burden on the defendant, but the burden is on the defendant to show that the defects were called to the attention of the complainant prior to the date fixed by complainant and yourself, and were the reasons or part of the reasons for your refusal to accept the title. That is my ruling.

40 Mr. Marder: May I argue that ruling?

Discussion.

The Court: If you have any decision to the contrary you may show it to me, but that is my ruling unless you have something to the contrary. I am willing to be convinced if I am wrong.

Mr. Marder: We contracted to buy these premises for the purpose of putting up an apartment house. The contract contained, if construed one way, rather hard provisions. We had to give notice on September first that the permit was rejected, in order to nullify the contract. As a matter of fact we did apply to the superintendant for a permit on August 22nd or 23rd. It was turned down. We had an entire month. Assuming we got the permit on or about September first, we had an entire month in which to search title to the premises to ascertain any defects. It is not the ordinary case, where there is no condition attached to the passing of title. In this case there was a condition attached to the passing of title. We felt that the condition was such that we did not have to take title to the premises in question, so we say that since we did not have to know the state of the title when we gave this notice on or about September 1st, nevertheless despite the fact that we did not inform the complainant of any objection that we might have to the title, we say we have a right to show whether or not it is equitable even now for us to take title to the premises in view of the question of defects of title. It is not, if the Court please, like the ordinary case where title is to pass on a certain day without any conditions. Then, if you say title is defective, you should equitably say "we reject

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Discussion.

title for this reason or that reason or the other reason." Our situation, if the Court please, is altogether different.

The Court: In what respect?

Mr. Marder: In that title was conditional. The contract itself was conditional.

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The Court: On the obtaining of the permit?

Mr. Marder: Yes.

The Court: That condition had been, according to your idea, performed or not performed as early as September 1st?

Mr. Marder: No, we had to protect ourselves. We believed, under the contract, by giving this kind of notice.

20

The Court: Do you mean to say that the notice was merely given for the purpose of protecting yourself and not actually to rescind the contract? Was that the intention?

Mr. Marder: Under the terms of the contract we felt we had to give that notice to protect ourselves.

The Court: Was that given for the purpose of rescinding the contract?

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Mr. Marder: For the purpose of protecting ourselves.

The Court: It was not given to rescind the contract?

Mr. Marder: Not given to actually rescind the contract.

The Court: Not so intended?

Mr. Marder: Not until the Board acted on the application.

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The Court: Then it may be considered that the notice that was mailed or given the

Discussion.

early part of September was not intended as an absolute rescission of the contract. It was dependent entirely on what happened later, on the application for the permit?

Mr. Marder: Yes.

The Court: Does not that put you in a position where your notice is absolutely of no effect. You cannot blow hot and cold. 10

Mr. Marder: Which is another equitable proposition. We didn't want to do that but the contract forced us into that position.

The Court: Let me see where that would lead you, for a moment. You give a notice of rescission, a notice which you say was not intended. Nevertheless, if the complainant had chosen, when they received that notice of rescission, they could have immediately entered into a contract with some third party, and they would have been protected. 20

Mr. Marder: That is right.

The Court: Then the notice was a rescission or not a rescission as you choose to call it.

Mr. Marder: A reading of the contract will disclose that no provision was made as to what would happen in the event the permit was not granted on September 1st. The argument might be made that the contract is incomplete on that score. 30

The Court: You may argue that point as far as you want after the case is closed, but I have heard all the argument on it now that I care to. If you show me any decision to the effect that you have a right to interpose these objections now after the date fixed for closing, then I will reverse my ruling, but 40

Herbert Lillian, direct.

unless you can, the ruling which I made, stands.

Mr. Marder: Will you permit me to introduce evidence of our objections to the title, defects in title, subject to your Honor's ruling?

10 The Court: We will dispose of that question when we get to it.

HERBERT LILLIAN, sworn for defendant, testified as follows:

Direct examination by Mr. Marder.

20 Q Mr. Lillian, what is your business? A I am an architect.

Q And your office is where? A 1860 Broadway, New York City.

Q How long have you been an architect? A About ten or eleven years.

Q You live here in Newark? A Yes.

Q And also practice in New Jersey? A I do.

Q And you are licensed to practice here? A I am.

30 Q You have had some practice in and about Newark? A I have.

Q In connection with apartment houses? A Yes, sir.

Q Do you know Mr. Joseph Isaacs? A I do.

Q Did he at any time during the summer of 1928 ask you to draw any plans for him? A He did.

40 Q When did he do that? A About the 29th or 30th of June.

Herbert Lillian, direct.

Q What did he ask you to do, what was his conversation with you?

Mr. Kristeller: I object.

The Court: Objection sustained.

Q What did you do for him? A I prepared sketches for an apartment house on Osborne Terrace and in fact I prepared two sketches, one of them he disapproved, and I prepared a second sketch which he approved, and I proceeded with plans. 10

Q How soon after he asked you to prepare plans, or rather after you had this first conversation with him, did you prepare the first sketch?

A I started on it immediately, and it took about two or three days to prepare the sketch. I offered that to Mr. Isaacs in his office. He disapproved it and I started on the next sketch. 20

Q Have you that first sketch with you? A I have. This is the first sketch (producing sketch).

Mr. Marder: I offer this first sketch in evidence.

Mr. Litwin: I object on the ground that it is immaterial.

Mr. Marder: I want to show the progress of these sketches until the— 30

The Court: Is it disputed that plans were prepared, and application made?

Mr. Kristeller: No, we know that application was made. I told your Honor that in the opening. The application was made sometime in August.

Mr. Litwin: But not by the Berwyn Estates, the vendee in this title.

Herbert Lillian, direct.

Mr. Marder: We will prove it was made for the Berwyn Estates.

The Court: If there is any question as to whether plans were prepared expeditiously, I will permit the plans in evidence, but if there isn't, I cannot see any reason for putting them in.

Mr. Kristeller: The application may have been expeditiously prepared, but the application wasn't made. The force behind it wasn't used.

The Court: Then I will let you introduce the plans in evidence.

(Plans marked Exhibit D. 2.)

Q Is that the second sketch which you have there? A Yes, sir (producing same).

Q And that came about four or five days after the last one? A Yes.

Q What is the difference in the two sketches? A In one we have 29 rooms, and the final sketch we have 28 rooms.

Q What was the cause of making the 28-room sketch? A Mr. Isaacs looked over the sketch and he said that the first sketch—

Mr. Litwin: I object to what he said.

The Court: Objection sustained. You are asked what was the cause of the change.

The Witness: The cause of the change was that the first sketch, the rooms weren't as rentable as the second sketch.

Q Which was a change that Mr. Isaacs wanted? A Yes.

Q Did Mr. Isaacs approve of these plans? A Yes.

Herbert Lillian, direct.

Q The second sketch? A Yes.

Q And thereupon you made plans? A Proceeded with plans.

Q And how long did it take you to make these plans? A About three weeks.

Q They were ready about when? A About the 1st of August. 10

Q Have you got the plans with you? A I have (producing same).

Mr. Marder: I offer these plans in evidence.

(Marked Exhibit D. 4.)

Q What did you do with these plans Mr. Lillian? A I had blue prints made and I prepared the application for the Tenement House Department. 20

Q When was that? A That was on August 1st.

Q And you took the plans down to the Tenement House Department on August 1st? A Yes.

Q And submitted plans to them? A Yes, sir.

Q And when did you get your approval, if any, from the Tenement House Department? A On August 23rd. 30

Q Have you the approval with you? A I have.

Mr. Marder: I offer the approval of the Tenement House Board in evidence.

Mr. Kristeller: I object to that as not being material. There is nothing in the contract which provides for the Tenement House Board. 40

Herbert Lillian, direct.

The Court: It only shows the progress of the proceeding. I will admit it. I don't think it has very much to do with it. It may have some.

(Marked Exhibit D. 5.)

10 Q Then what did you do? A I took the approved plans from the Tenement House right into the Building Department and filed application there for approval in the Building Department. I knew that the plans did not comply with the zoning ordinance, and I asked Mr. Fiberson of the Building Department to reject the plans, so we wouldn't have any loss of time.

Q You knew he would reject them anyhow because of the zoning ordinance? A Yes, he rejected the plans immediately and I filed notices
20 to the Superintendent of Buildings, Mr. Frederick Bigelow and Mr. Rankin of the Board of Adjustments, that we would apply for a modification of the zoning.

Q This application was made in the name of the Towne Holding Company? A It was.

Q Were you present at the first meeting of the Zoning Board? A I was.

Q And that was when? A That was on Sep-
30 tember 6th.

Q You were there in behalf of the Towne Holding Company? A Yes.

Q What happened there? A I saw we had over 15 objectors there, and I didn't want to assume the responsibility of being turned down and rejected, and when a postponement was made, I felt satisfied, too many objectors.

Q It was postponed. You were satisfied with the postponement? A Yes.
40

Herbert Lillian, direct.

Q Will you tell us what street setback provisions are necessary because of the ordinance?

A The ordinance does not provide any setbacks at all. It does not require it.

Q The Building Code. A It says a setback with the other property.

Q I mean as to area set back, percentage setback? A We would occupy more than 70 per cent. of the lot. 10

The Court: The front 70 per cent. or the rear 70 per cent.?

The Witness: Cannot occupy more area than 70 per cent. of the entire lot.

The Court: Without specifying where that 70 should be?

The Witness: Where we need courts and yards, that would be taken up as unoccupied area. 20

Q Will you tell us first the depth of your building according to your plans? A 128 feet.

Q How much, both yard front and area would be necessary? A 22 feet.

Q That is on a linear basis? A Linear basis.

Q I show you copy of an application for building permit. Does this look familiar to you, or is this like an original that you filed, in any way? A Except mine was written, instead of typewritten. 30

Q Look at the diagram there. Is that similar? A Yes.

Q And that shows a ten-foot setback? A Yes.

Q You provided for a ten-foot setback, so as to leave a 12-foot yard? A Yes. 40

Herbert Lillian, cross.

Q Is there any minimum requirement as to the rear yard in connection with the Building Code of the City of Newark? A Ten feet.

Q That is the minimum requirement of the Building Code? A That is right.

10 Q Do you know whether it is customary for the Building Department of the City of Newark to act on apartment house permits before the Tenement House Board has acted upon them? A No, sir; they never do.

Cross examination by Mr. Litwin.

Q Is this in your handwriting, Mr. Lillian? A Yes.

20 Mr. Litwin: I offer it in evidence for identification (marked Exhibit C. 10 for identification).

Q You just stated that the Building Department and Tenement House Board do not act upon applications simultaneously, is that right? A That is right, yes.

Q You also stated that you received the approval of the Tenement House Board on August 23rd, 1928? A That is right.

30 Q Then will you kindly explain to the Court how it is that you were able to present this application on August 22, 1928, for the approval of the Building Department? A That was the day I wrote the application out.

Q When did you file it? A On the 23rd.

Q The same day Mr. Fiberson rejected the plan? A Yes.

40 Q Did you know on August 22nd as to what the decision of the Tenement House Board would be? A Yes.

Herbert Lillian, cross.

Q How did you know that? A I called on Mr. LeRoy, of the Tenement House Department, and he said he would be ready tomorrow morning the 23rd, and had the plan approved.

Q At that time, what did he tell you? A He said stop in at 10 o'clock in the morning, and he would have the plan. 10

Q Are you a licensed architect? A Yes.

Mr. Kristeller: No questions.

Examination by the Court.

Q You said when you prepared these plans you knew that they conflicted with the Building Code or zoning ordinance? A Yes.

Q How did they conflict with the zoning ordinance, was it the zoning ordinance or Building Code? A It was the zoning ordinance. 20

Q And how did they conflict with the zoning ordinance? A It was out of the five story number of families in the area, out of their district.

Cross examination by Mr. Litwin.

Q Is this site in the apartment house area at all, according to the zoning ordinance? A It is not. 30

Q Aren't there other apartments on the street? A Right adjoining.

Q Why didn't you first file your plans with the Building Department, so that you could file your plans with the Board of Adjustments, before you went to the Tenement House Board? A In the tenement house proposition, the Building Department will not accept the tenement house plan unless it was approved first by the tenement 40

Herbert Lillian, cross.

house, and meets with their requirements before they will pass on it.

Q But you know that they would not pass on it, the Building Department of Newark? A I knew it.

10 Q You knew it was entirely up to the Board of Adjustments? A Yes.

Q Why then did you present your plans, knowing that they were going to be turned down, to the Building Department and immediately file your appeal to the Board of Adjustments? A They would not accept them.

Q The Board of Adjustments would not? A Nobody would. The Building Department wouldn't accept any tenement house plans unless first approved.

20 Q What interest has the Board of Adjustments in the plans, excepting that they conform with the zoning requirements? A If the Building Department wouldn't accept the plans, they would deny your application.

Q You cannot then present the plans to the Building Department unless you had the approval of the Tenement House Board? A Yes.

30 The Court: It seems to me now that all parties had some idea when they entered into this contract, that a five-story apartment was going to be a violation of the zoning ordinance, isn't that correct?

(All counsel answer yes.)

The Court: And that it would be necessary to make an application to the Board of Adjustments in order to get the permit, is that correct?

40 (All counsel answer yes.)

Russell B. Rankin, for Defendant, direct.

The Court: As I understand this zoning procedure, although I am not familiar with it, notwithstanding the fact that the zoning ordinance prohibits certain buildings, the Board of Adjustments may make some concession, if they deem it to the best interest of the community.

10

(All counsel answer yes.)

Mr. Marder: Which is still subject to appeal.

The Court: But it may be considered for the purposes of these cases, that it was in the minds of all the parties at the time the contracts were entered into, it was necessary to take this matter to the Board of Adjustments, because the zoning ordinance prohibited the erection of five-story apartments.

20

Mr. Litwin: The contract so stated.

Mr. Kristeller: Or any apartments.

The Court: Doesn't it follow from that that any refusal of the permit by anybody except the Board of Adjustments, was not such refusal as was contemplated by the contract.

Mr. Kristeller: That is the point.

30

RUSSELL B. RANKIN, sworn for the defendant.

Direct examination by Mr. Marder.

Q You are the secretary of the Board of Adjustment of the City of Newark? A I am.

Q Are these certified copies of papers that you have in connection with the application of

40

Russell B. Rankin, for Defendant, direct.

the Towne Holding Company for an apartment house permit at premises 57 to 63 Osborne Terrace? A Yes, sir.

Q These are the minutes? A These are.

10 Q And this is the notice of appeal and the other is the rejection by the Building Department dated August 23, 1928, because area, height and number of families exceeded? A Yes.

Mr. Marder: I offer these in evidence.

(Marked Exhibit D. 6, D. 7 and D. 8.)

I also offer in evidence the appeal, or application for variance as it is called.

(Marked Exhibit D. 9.)

20 Mr. Marder: With the Court's permission I propose to read the minutes of the Board of Adjustment in connection with this application.

Mr. Kristeller: Objected to, because these are merely extracts made by the secretary. There is a stenographer present under subpoena who actually took care of everything that happened.

30 The Court: Are the minutes here? The extracts dealing with the Towne Holding Company's application are the complete minutes?

The Witness: I have the original minutes in addition to the certified copy.

The Court: You may read this into the record, and either counsel for complainant may read anything in addition from the minutes, or the whole of them.

40 Mr. Litwin: I object to what these minutes show as to what occurred subsequent to the giving September 2nd and subsequent to the giving

Russell B. Rankin, for Defendant, direct.

of the notice of decision, and therefore not binding on the complainant.

The Court: I will receive it.

The Witness: (Reading): "September 6, 1928 Present: Mr. Fitzsimmons; Mr. Higgins; Mr. Lawrence; Mr. Teichner; Fire Chief Towey.

10

132-28H

57-63 Osborne Terrace.

Towne Holding Co. Owner: John J. Kelly.

Many objectors present. Stated that notice of this application came just before the holiday, and that many of the residents had not had time to go into the matter.

Request that it be laid over was granted.

* * * * *

20

September 20, 1928

Present: Mr. Fitzsimmons; Mr. Higgins; Mr. Lawrence; Mr. Teichner; Fire Chief Towey.

132-28-H

57-63 Osborne Ter.

Towne Holding Co. Owner: John J. Kelley.

To permit in a 30 foot height district the construction of a 5-story apartment house exceeding height, area and number of families.

30

Miss Blume asked that it be laid over to give her a chance to interview neighbors. Three other objectors present.

The case was postponed for two weeks.

* * * * *

October 4, 1928

Present: Mr. Fitzsimmons; Mr. Higgins; Mr. Lawrence; Mr. Teichner.

40

Russell B. Rankin, for Defendant, direct.

Fire Chief Towey, the other member, was reported as being sick in bed.

132-28-H

57-63 Osborne Ter.

Towne Holding Co. Owner: John J. Kelly.

10 To permit in a 30-foot height district the construction of a five-story apartment house exceeding height, area and number of families.

Applicant present. Said it is to be an apartment house of three and four rooms—no one room apartments.

20 FOUR objectors present. Miss Blume said that if it is to be a high class apartment setback on line with other houses they would not object.

Applicant said he could not set back, and asked that a vote be taken on it now.

On motion to grant, application was denied by the following vote:

Nays: Mr. Fitzsimmons, Mr. Higgins, Mr. Lawrence, Mr. Teichner.

Absent: Fire Chief Towey."

30 Q Is this the official action of the Board of Adjustment denying the permit in question? A Yes, sir.

Q Did the Board of Adjustment have any hearings in August? A They did not.

Q That is August, 1928? A No, there were no hearings whatever.

The Court: Why not?

40 The Witness: As I recall your Honor, the Board takes a vacation. I will start over again. We hold two meetings a month, and

Russell B. Rankin, for Complainants, direct.

we cut out the two in August that year and also the year before. Very few applications come in at that time of the year and we usually take a short vacation.

Mr. Kristeller: May we use Mr. Rankin in case of any rebuttal testimony? He is an official of the City of Newark at the City Hall. 10

The Court: Yes.

RUSSELL B. RANKIN, called on behalf of complainant.

Direct examination by Mr. Kristeller.

Q Is there any record on your minutes at whose request the department action was taken on September 6th? A The record says, "Request that it be laid over was granted." It doesn't show. 20

Q Does it show whether the applicant was present at that time? A Does not.

Q Does it show whether the applicant was present on September 20th? A It does not.

Q But it does say whether or not the applicant was present on October 4th, doesn't it? A Yes. 30

Q And as secretary of this Board would you say that the applicant was present on September 6th, or on September 20th—

Mr. Marder: I object. The minutes speak for themselves.

The Court: He may testify as to his recollection whether or not the applicant 40

Russell B. Rankin, for Complainants, direct.

or a representative of the applicant was present on either or any of those days, but outside of that he can only testify to what the minutes show, not what he assumes from the fact that they do show one thing or the other.

10 Mr. Kristeller: They are his own minutes. I withdraw the question.

Q Do you remember whether or not the applicant was present or represented at either or both the meetings of September 6th or 20th?
A I do not recollect.

20 Q The Board of Adjustment had two meetings in July, 1928? A Possibly. I could tell by referring to the minutes. There was a meeting July 5th and July 19th and 26th, three meetings in July, to make up for the August meeting.

The Court: Is the August vacation a usual vacation?

The Witness: Yes, sir.

The Court: Have it every year?

The Witness: We have had.

30 Q Is that a condition which is generally known among architects? A We usually announce it beforehand on the bulletin board.

Q That does not answer my question. If you don't know, don't answer. A I don't know whether it is generally known among architects.

40 The Court: My recollection is that the architect who testified, and who was called by the defendant, said, he was present at one of these meetings, I think, I think

William Okin, direct.

it was the first one, and I assumed from what he said, that the postponement was had then at his request, because he didn't want to take the responsibility of having a refusal against the 15 objectors.

Mr. Kristeller: The record don't show that.

10

The Court. He testified to that.

WILLIAM OKIN, sworn for the defendant.

Direct examination by Mr. Marder.

Q Are you one of the officers of the Berwyn Estates? A I am.

20

Q What office do you hold? A I am vice-president and treasurer.

Q Is Mr. Joseph Isaacs connected with the Berwyn Estates? A He is president.

Q Are you two the sole stockholders of the Berwyn Estates? A Excepting a few shares held in small amounts by one or two friends, we are.

Q Is the Towne Holding Company one of your subsidiaries? A Yes.

Q The matter of this contract was in charge of Mr. Isaacs, was it not? A It was.

30

Q Did you know anything about it? A Excepting what he told me. That is all I knew about it, and the written contract which I saw after that came back to the office.

Q Did you know anything about the plans for the premises in question? A I knew they were being made, but that is all.

Q Do you know for whom they were being made? A They were being made for us.

40

Herbert Lillian, recalled, By the Court.

Q And that is the Berwyn Estates? A Yes. The Towne Holding Company is a company of ours and we use it for purposes such as this and other purposes, where we don't want to appear on record ourselves.

10 Mr. Marder: If there is any doubt in the minds of my opponents as to whether the application was made on behalf of the Berwyn Estates, Mr. Isaacs will have to testify to that.

Mr. Kristeller: We make no point of that.

The Court: Before the architect leaves the room I want to ask him a couple of questions. Won't you step to the stand?

20

HERBERT LILLIAN, recalled.

Examination by the Court.

Q My recollection is that you said you were asked the latter part of June about the 29th of June, to make these plans? A Yes.

30 Q And they were completed about the middle of July? A They were completed about July 31st or August 1st.

Q Where is your office? A At 1860 Broadway, New York.

Q Had you made applications before to the Zoning Commission or Board of Adjustment for permit for the erection of buildings here in Newark? A I have.

40 Q Did you know that it was their custom to not hold any meetings during the month of August? A I did not know. When I filed them

Abraham Welanko, direct.

on August 23rd, the notification to the Superintendent of Buildings, Mr. Rankin, I found out at that time that there would be no meetings until the meeting of September 6th.

Q You didn't know in July when you were preparing these plans that it would be necessary for you to present the plans in July in order to have consideration of them before September 1st? A I did not. 10

Q Did you make any inquiry as to requirements? A I knew they were meeting there every two weeks. I didn't know the long vacation.

Further direct examination by Mr. Marder.

Q I also remember you said that you submitted two sketches? A Yes. 20

Q And the second sketch was about a week after the first sketch, July 1st? A Yes.

Q Then evidently it took you three weeks to draw your plans? A That is right.

Q Is that an expeditious time? A You cannot prepare a set of plans for that sized building in less time. That was done as speedily as expected by anybody.

Q How many rooms were there in the building? A 28 on a floor, 140 rooms. 30

ABRAHAM WELANKO, sworn for defendant.

Direct examination by Mr. Marder.

Q Mr. Welanko, you are a lawyer in New Jersey practicing in Newark? A Yes.

Q For how many years? A Since 1915. 40

Abraham Welanko, direct.

Q And at my request, did you examine the records and the title to the property in question? A I did.

Q And have you an abstract of the title to the property? A I have.

10 Q May I see it? A The original and typewritten copy.

Q Then the typewritten copy was compared with the original notes that you had? A Yes.

Mr. Marder: I offer this abstract in evidence.

Mr. Litwin: When did you make this search?

The Witness: Last week.

20 Mr. Litwin: I object to it for the following reasons: First that it was made subsequent to the institution of the suit, second, it was not called to our attention at any time and thirdly, the fact that there may be an apparent discrepancy in the title, or a defect in the title, does not make it such, unless this witness will testify to the facts concerning the particular instrument, and lastly, having based their ground for rescission upon the failure to receive the permit, they are now barred from urging any
30 defense as to the question of title.

The Court: Mr. Litwin, I have already ruled on that question, as to the effect of these objections, but if Mr. Marder thinks he can show me any authority to the effect that I am wrong, I have no such pride as to my opinion, that I will not give him an opportunity to correct me, but I am very strongly of the opinion now that it has no
40 place in the case. Because of Mr. Marder's

Abraham Welanko, direct.

insistence, I am willing to admit it with the understanding that before it is considered he will have to show me the authority which shows that it belongs in the case.

Mr. Kristeller: May I note my objection to the admission, not so much on these grounds but on the ground that if this search was made last week, that any information as to any defense was not available either on September 1st or October 1st. 10

The Court: I can only say it does not make any difference what the defenses were unless they were brought to the attention of the complainant at or before the day fixed for settlement. They cannot be used as a basis for a revision of the contract, or an excuse for not performing the contract. 20 That was my ruling before. I make the ruling now, but I will permit the testimony to go in with the expectation that there will be no decision brought to my attention that my ruling is wrong. Nevertheless with the idea that I ought not to preclude the evidence, if it can by any possibility be admitted.

Mr. Kristeller: I presume if your Honor changes his mind, you will permit us under the cases—gives us time within which to remove any of these so-called errors. 30

The Court: If we get up to that point I will consider it.

Mr. Marder: I offer the abstract in evidence.

(Marked Exhibit D. 10.)

Abraham Welanko, direct.

Further direct examination by Mr. Marder.

Q Mr. Welanko, you set up your restriction?

A I do.

Q That is set up in which deed? A Deed
Y 25 page 498 from James H. Osborne and
10 others to William P. Cleaver, and a reference to
the same restriction in the deed from James
H. Osborne and others to E. Alexander Under-
wood and recorded in Book 26, page 219.

Q Are these questions made by you on the
first page of that abstract?

Mr. Kristeller: I suppose this is all
taken with the same objection.

20 The Court: Yes, and I will say right now
that if this examination is going to be pro-
longed, for the purpose of showing these
alleged defects in the title, I will exclude
it altogether. I think it has no place in
the case.

Mr. Marder: May I offer then in a very
summary way, just the abstract, and this
other deed which has a slightly different re-
striction?

30 The Court: Yes, you may in that way,
but I will not sit here and listen to a lot of
testimony that I think is absolutely imma-
terial. I will give you the privilege of put-
ting it in to save your point.

Q And is this a copy of a warranty deed from
the Osbornes to Navatier, where the restriction
is somewhat different? It is an abstract of it?

A Yes.

40 Mr. Kristeller: If it is not the prop-
erty—

Abraham Welanko, direct.

Mr. Marder: It is part of the neighborhood scheme.

The Court: Do you say that this restriction in a deed a copy of which you have in your hand is binding on these properties?

Mr. Marder: It shows the intent. That is the point I would like to make. 10

The Court: The intent of the restrictions?

Mr. Marder: On our property.

The Court: Whether it is binding on these properties will be determined from the language used in the restrictions in the deeds applying to these properties.

Mr. Marder: There was also a neighborhood scheme. This property is part of a neighborhood scheme of restriction, and this is one of the pieces that was restricted in accordance with the neighborhood scheme. 20

The Court: The contract was not subject to any neighborhood scheme, it was only subject to restrictions of record.

Mr. Marder: We find a neighborhood scheme.

The Court: On record?

Mr. Marder: From the evidence.

The Court: From the record? 30

Mr. Marder: From the record in this way that all of the facts—lots, are subject to the same or similar restriction. I offer this abstract in evidence.

Mr. Kristeller: I object to it on the ground—

The Court: The objection is sustained. It is not admissible at least until after the neighborhood scheme is shown. 40

Abraham Welanko, direct.

Q Did you search the records for the deed from the Osbornes covering the various lots shown on this map which I show you? A I did.

Q And did you take them all off? A I took off every deed, or made a record of the restrictions of every deed out of the Osbornes, covering
10 the 48 lots in the Osborne tract.

Q Did each one of these deeds contain a restrictions? A Each one of the deeds contained a restriction. The restrictions are similar.

The Court: That does not get you anywhere. If they are all the same all right, and if they are different, then it may be assumed that the grantor intended that different restrictions should apply.

20 Mr. Marder: They were practically the same.

The Court: I am not interested in practically the same. If they are different they are different. If they are the same they are the same.

Q Were they the same?

30 Mr. Kristeller: I think your Honor is using up time that you ought not to. If they are not the same then it wasn't a neighborhood scheme to start off, but the restrictions have already been considered as not being a neighborhood scheme, in the case that I cite in my memorandum.

Mr. Marder: I think that opinion calls it a neighborhood scheme.

40 Mr. Marder: May I offer it for what it is worth?

Abraham Welanko, direct.

The Court: Yes, and I will sustain the objection to its admission. My reason for saying that is because it is not worth anything in this case in my judgment under my ruling.

Mr. Marder: May I have it marked for identification?

10

The Court: You may do so.

(Marked Exhibit D. 11 for identification.)

Cross examination by Mr. Litwin.

Q Outside of examining the records you did nothing to check up any of these defects that you say are in the title, did you? A Secure the defects?

Q Did you check up as to whether the defects actually exist? A No.

20

Q I understand that one of the defects is that someone is not stated to be single, divorced or married? A No. One of the questions raised is the fact that there is no record of the death of one of the former owners of the property, nor any record of his heir in the Essex County Surrogate's Office.

Q You did nothing further to ascertain? A As to who he may be.

Q Or whether the deed by the grantor was a correct deed by the proper parties? A I did nothing but take off the records at the Court House.

30

Further direct examination by Mr. Marder.

Q Did you not search the Surrogate's records in connection with the account of one—or rather the estate of Peter Sanford? A Yes.

Mr. Kristeller: That is objected to.

40

Abraham Welanko, direct.

Q To ascertain whether Miller was appointed trustee of that estate? A I did.

Q You didn't find anything showing any such appointment, did you? A He was appointed administrator with the will annexed.

Q But not trustee? A Yes, but not trustee.

10 Q Did you search the records of the Prerogative Court? A No.

Mr. Marder: I offer these pictures in evidence.

Mr. Litwin: I object to them.

Mr. Marder: Of all of the houses on the block.

The Court: For what purpose?

20 Mr. Marder: To show that this restriction is at least adopted so far as we are concerned.

The Court: How do the photographs have any bearing on it?

Mr. Marder: To show the kind of house.

The Court: That doesn't mean anything.

30 Mr. Marder: That is what we allege: Here are restrictions covering this entire block, from this Herman case. The Court held because of variation and because of the doubtful meaning of the restriction of the word "dwelling," it would not enforce a restrictive covenant as against the owner of that property, who wanted to put up his three-story apartment. I have a picture of that three-story apartment house here. What we propose to do is to put up—or rather we propose to put up this five-story apartment house building, which is an altogether different proposition than the three-story apart-

40

Abraham Welanko, direct.

ment house proposition. The restrictions call for a 20-foot setback, there again in violation of the terms of the contract. No mention is made in the contract of a 20-foot setback. We say that because of the rules and regulations of the building code we cannot put up a five-story apartment building on the plans that we submitted, with a 20-foot setback. It is an impossibility. We allege that this is a neighborhood scheme, and that all of these property owners, many of them were present when our application for change of zone was up, will have a right to say you are changing this neighborhood by putting up this five-story apartment house, and will have at least arguable case. I do not say that they are within it, but we will have at least an arguable case and I say that I am entitled to show that they have at least an arguable case.

The Court: What you are trying to prove is a condition indicated by the fact that the houses here are all, with the exception of the three-story apartment house, of a uniform character?

Mr. Marder: Yes.

The Court: All of which you knew before you entered into the contract, didn't you?

Mr. Marder: Yes. We probably did. We saw the property, but we did not know the restriction, and we are not charged with that restriction as it is.

The Court: You cannot get any additional benefit from some fact which you actually knew at the time the contract was entered into.

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Abraham Welanko, direct.

Mr. Marber: It may be conceded, I presume, by the other side that all of the houses in this neighborhood are of substantially the same character excepting this apartment house.

10 Mr. Kristeller: And on the other side of the street there are several apartments, and on this side there are two more, but they are just beyond the line originally owned by Osborne.

The Court: I do not think these photographs have any place whatever in the record. I will exclude them.

Mr. Marder: I would like also to offer these and have them marked for identification.

20 The Court: You may have them marked for identification if you wish.

(Marked D. 12, D. 12A, D. 12B, D. 12C, D. 12D, D. 12E, D. 12F, D. 12G, D. 12H, D. 12I, D. 12J, D. 12K, D. 12L, D. 12M, D. 12N, D. 12O, D. 12P for identification.)

30 The Court: I do not consider these objections you are making have any place in the case, and I have so ruled. I said, for the purpose of giving you an opportunity to argue that in your brief, if you want to, I will permit the introduction of evidence indicating the defense but that I would limit the extent of this evidence. Now you want to encumber the record with a dozen or two photographs which I will not permit because I do not see any sense in it because I don't think there is anything to your point. You have the benefit of it and if I am wrong in my ruling you have the benefit of it just as

40 much as you would have if you put in all

Harry Wright, direct.

these different pieces of evidence which you are trying to get in.

Mr. Marder: I also offer in evidence this map of the Osborne property showing the restrictions.

Mr. Kristeller: I make the same objection. 10

The Court: Objection sustained.

Mr. Marder: I offer it in evidence for identification.

(Marked Exhibit D. 13 for identification.)

HARRY WRIGHT, a witness for complainant, being duly sworn according to law, on his oath deposes and says: 20

Direct examination by Mr. Litwin.

Q What is your profession? A Lawyer.

Q Are you connected with any Title Company? A I am.

Q What Title Company? A Lawyers Title Guaranty Company.

Q In what capacity? A Assistant Title Officer. 30

Q Have you examined the deed out of the Osbornes for the Eckhaus property? A I don't know just which is the Eckhaus property.

Q 750 feet from the corner? A Yes.

Q And have you examined the deed for the Mendel property, starting 700 and 15/100th feet from the corner? A Yes.

Q Have you looked at the original Osborne map? A Yes. 40

William Fiverson, direct.

Q Will you state as to whether the Eckhaus and Mendel properties come out of the original Osborne tract, as set forth in the Osborne map on file? A They do.

No cross examination.

10

WILLIAM FIVERSON, a witness for complainant, being duly sworn according to law, on his oath deposes and says:

Direct examination by Mr. Litwin.

Q You are connected with the Building Department of the City of Newark? A I am.

20 Q I show you Exhibit P. 7 and ask you whether this is a true copy of the application filed with your Department? A This is not the one I saw? It may be a copy of it.

Q Is that a copy? A It may be a copy of it.

Q I show you Exhibit C. 6 for identification. A Yes, this is the application that was submitted to me.

Q When was that filed with the Building Department? A On August 22nd, 1928.

30 Q And when did you take any action? A On August 23rd, 1928.

Q And is the notation as to the action of your Board in your handwriting? A Yes, I rejected it.

Q Why? A Because the area height, and number of families were exceeded.

Q Mr. Fiverson, is it possible for an application to be pending with the Building Department of Newark and with the Tenement House Board at the same time? A Yes.

40

William Fiverson, cross.

Q Has that been done? A Yes.

Q Is it necessary that the plan be approved by the Tenement House Board at the date they are submitted to your Department? A No.

Q How long have you been with the Building Department in Newark? A Fifteen years.

Q I think you said that you were connected with the superintendent? A No, I am one of the engineers.

10

Cross examination by Mr. Marder.

Q Isn't it customary, however, to first get the approval of the Tenement House Board before the application is filed with the Building Department? A No.

Q Isn't that customary? A No.

20

Q Didn't you tell me so this last week? A I did not. I said I do not approve the plans until they bear the approval of the Tenement House Board.

Q You did tell me that you do not approve the plans until they bear the approval of the Tenement House Board? A Yes, but they may be filed with us before.

Q You don't act on them before they are approved by the Tenement House Board? A We examine them.

30

Q But you don't act on them or approve or reject? A I don't approve them; I reject them, yes.

Q Isn't there a regulation of the Building Department not to approve plans for tenement houses until first approved by the Tenement House Board? A Yes.

Q And isn't the regulation generally known by architects? A I presume it is.

40

William Fiverson, further direct.

Q Didn't you reject this plan as soon as it was given to you? A I rejected it when it was brought to my attention. Plans are usually given to clerks.

Q Wasn't this given to you? A It may have been handed to me, yes.

10 Q And then you turned it down right away?
A Yes.

Q You wouldn't wait a day to turn it down?
A I do it to accommodate a man, to expedite a matter. I try to give them action. In this case I recalled Lillian asking me to reject it which I did.

Q You rejected it because he gave you the application? A I rejected it when it was handed to me but I don't know whether it was first handed to a clerk or not.

20 Q Mr. Lillian handed it to you? A Yes.

Q He spoke to you about it? A Yes.

Q And it was on the 23rd that you rejected it? A Yes.

Q Why do you say that it was filed with your Department on the 22nd? A It is dated so.

Q Is that the only reason for your saying so?
A Yes.

30 *Further direct examination by Mr. Litwin.*

Q Is there any regulation of your Department which prevents rejection of a plan before it has been presented to the Tenement House Board?
A No.

Mr. Litwin: I offer in evidence Exhibit C. 6 for identification.

(Marked Exhibit C. 6.)

40 (By consent Exhibit C. 7 is substituted for Exhibit C. 6.)

Fred M. Sommers, direct.

FRED M. SOMMERS, a witness for complainant, being duly sworn according to law, on his oath says:

Direct examination by Mr. Kristeller.

Q What is your business? A Clerk. 10

Q Where? A City Hall.

Q In whose Department or in what Department? A Mayor's Department.

Q Did you take the stenographic minutes of the meetings of September 6th, September 20th and October 6th, 1928, of the Board of Adjustment of the City of Newark? A I did.

Q Have you, pursuant to subpoena, produced your original notes of these meetings? A I have. 20

Q Will you turn to the meeting of September 6th, 1928, at which a hearing of the application on property 57-63 Osborne Terrace, Newark, was being held? A Yes.

Mr. Marder: I object. I don't know how accurate they are, or what the purpose of the taking of them was. He is not connected with the Board of Adjustment, and Secretary of the Board took the minutes of the meeting and I don't think this testimony is competent. 30

The Court: The minutes of the meeting are not the only evidence, which can be submitted as to what took place there? If it is now intended to show that something else took place at the meeting besides what appears from the minutes I will admit it.

Mr. Kristeller: No, nothing else that took place. I simply wanted to rebut the testi- 40

Fred M. Sommers, direct.

mony of, I think it was Rankin, who said he was present at the first meeting, to show that the stenographer who took the appearances has no record of any appearance on behalf of the applicant at that meeting. It does not appear in the extract here.

10 The Court: You may ask him if he took a record of those who were present.

Mr. Kristeller: I withdraw the other question, and ask that—

Q Did you take a record of the people who were there on this application? A No, I did not, only that there were many objectors there.

Q You didn't take the individuals? A No.

20 Q Did you take a record as to whether or not the applicant was present? A I did not.

Q Your records do not show whether or not the applicant made a request for an adjournment? A The request was made by the owner of No. 48.

Q Your record shows that? A Yes.

Q No. 48 what? A No. 48 Osborne Terrace; no name.

30 Mr. Kristeller: We rest.

Mr. Marder: As to the testimony of Mr. Isaacs—

Mr. Litwin: May we ask what he will testify to? We might admit it.

40 Mr. Marder: As I understand it, ruling out what Mr. Lillian could have testified to, as to what Issacs told him in connection with making plans and what he said about the first sketch and the second sketch, and what he said about pushing the plans

Fred M. Sommers, direct.

through as soon as possible, because the title was contingent upon a permit.

Mr. Kristeller: I will admit that he will say that if he were here but it is not material and not binding on us.

Mr. Marder: He was also present at the second or third meetings of the Board of Adjustment, I believe. 10

The Court: Do you admit that also?

Mr. Kristeller: We cannot admit that. My client says that he came after the hearing was over, the second time, and he was there on the third, and the record shows he was there.

The Court: How much materiality has it anyway? I don't think it is of sufficient materiality to delay disposition of this case until you can produce him as a witness. 20

Mr. Marder: I understand Mr. Kristeller admits he was there at the third hearing.

Mr. Kristeller: The record discloses that.

Mr. Marder: And also that he told Mr. Lillian that he wanted these plans prepared as soon as possible because he had to get his permit, he had to do something in connection with the permit. 30

Exhibit C. 2.

EXHIBIT C. 2.

September 1, 1928.

10 TO LILLIE ECKHAUSE and ELMER ECKHAUSE, her husband, AND LIONEL KRISTELLER, ATTORNEY FOR LILLIE ECKHAUSE and ELMER ECKHAUSE, her husband:

20 YOU ARE HEREBY NOTIFIED that the undersigned, in accordance with contract dated June 26th, 1928, have attempted to procure a permit for the erection of a five story apartment house upon premises commonly known as 61-63 Osborne Terrace, Newark, N. J., and that although the undersigned have vigorously prosecuted the application for same, a permit has been refused.

The undersigned, therefore, demands that you return to them the deposit of \$500.00 paid upon the signing of said contract.

BERWYN ESTATES.

By WILLIAM OKIN
Vice President.

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Exhibit C. 3.

EXHIBIT C. 3.

ARTICLES OF AGREEMENT

MADE the Twenty-seventh day of June, in the year of our Lord, One Thousand Nine Hundred and Twenty-eight,

BETWEEN ISAAC G. MENDEL and FLORENCE MENDEL, his wife, of the City of Newark in the County of Essex and State of New Jersey, party of the First Part;

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AND BERWYN ESTATES, a corporation of the State of New Jersey, having its principal office in the City of Newark in the County of Essex and State of New Jersey, party of the Second Part;

WITNESSETH That the said party of the First Part, for and in consideration of the sum of TWENTY THOUSAND (\$20,000.00) DOLLARS to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenant and agreements hereinafter mentioned, made and entered into, by the said party of the Second Part, doth agree to and with the said party of the Second Part that they the said party of the First Part, will well and sufficiently convey to the said party of the Second Part, its successors and assigns, by Deed of Warranty free from all encumbrance excepting as hereinafter mentioned, on or before the first day of October next ensuing the date hereof, all that lot, tract, or parcel, of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey,

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BEGINNING at a point in the westerly line of Osborne Terrace distant seven hundred feet and fifteen one-hundredths of a foot from the south-

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Exhibit C. 3.

erly line of Clinton Avenue; thence (1) running north sixty-seven degrees thirty-six minutes west one hundred fifty feet to a corner; thence (2) south twenty-two degrees twenty-four minutes west fifty feet to a corner; thence (3) south
 10 sixty-seven degrees thirty-six minutes east one hundred fifty feet to the westerly line of Osborne Terrace; thence (4) along the same north twenty-two degrees twenty-four minutes east fifty feet to the place of Beginning. Being lot #34 on a map of property of James H. and Robert A. Osborne, surveyed by Francisco & Barkhorn, December 8, 1890.

Said premises shall be conveyed subject to the two mortgages hereinafter mentioned; to restrictions of record, if any, which do not prohibit how-
 20 ever, the erection of the apartment house hereinafter mentioned, and the provisions of the Building Zone Ordinances of the City of Newark, N. J. to the extent that they are valid, the parties hereto however, not admitting their validity, said Zoning Ordinances being subject, however, to the terms and conditions hereinafter mentioned.

The within premises are known and designated as 57-59 Osborne Terrace.

The party of the second part agrees that the
 30 building upon said premises has been recently burned and that the parties of the first part do not assume any obligation to repair or restore said building, and further, that any insurance moneys due by reason of said fire shall belong to, and be collectible by the parties of the first part, and that the party of the second part shall have no rights therein.

It is expressly understood and agreed that the title to the land and premises hereby agreed
 40 to be conveyed is not derived from any Martin

Exhibit C. 3.

Act proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments, or by adverse possession.

Insurance premiums, water rents, taxes, and interest on mortgages, shall be adjusted, apportioned and allowed as of the day of delivery of said deed, and the result thereof shall be added or deducted, as the case may be, from the amount of the bond and purchase money third mortgage hereinafter mentioned, to be executed by the party of the second part on the date of settlement. 10

It is further understood and agreed that the party of the second part has entered into a contract this day with LILLIE ECKHOUSE and her husband, for the purchase of the adjoining premises. Should the said Lillie Eckhouse and her husband, fail to convey the said premises, in accordance with the terms of their written agreement with the party of the second art, thru no fault of the party of the second part, then and in that event, the party of the second part shall not be obliged to consummate the within contract, and in that event, the within agreement shall be null and void, and the party of the first part shall return to the party of the second part the deposit hereinabove mentioned, anything herein contained to the contrary notwithstanding. 20

The party of the first part agree that they will procure permission from the holders of the first and second mortgages aggregating \$6500.00 now embracing the aforesaid premises to demolish the present building upon the premises, without any hindrance upon the party of the said mortgagees. 30

AND the said BERWYN ESTATES for itself, its successors and assigns doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and 40

Exhibit C. 3.

- assigns, that it the said party of the Second Part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the First Part, the said sum of TWENTY THOUSAND (\$20,000.00) DOLLARS as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:
- 10 \$ 100 On the execution and delivery of this agreement, the receipt whereof is hereby acknowledged.
- 6,500.00 By the parties of the first part conveying said premises subject to two mortgages now thereon totalling the sum of \$6500.00 which mortgages are past due.
- 999.00 Absolutely in cash or by certified
- 20 check, on the said date of settlement, when the said deed of warranty is delivered and title passes to the party of the second part.
- 12,500.00 Subject to the apportionments here-
- _____ in mentioned, by the party of the second part executing and delivering to
- \$20,000.00 the parties of the first part, on the said date of settlement, when the deed of warranty is delivered to the
- 30 party of the second part, its bond in the penal sum of double the amount of such calculation, conditioned for the payment of the principal sum thereof, which bond shall be secured by a purchase money third mortgage upon said premises which shall be next in priority only to the afore-
- said two mortgages now thereon totalling the sum of \$6500.00. which bond and purchase money third mortgage shall be payable two years after the date thereof, and shall bear interest at the rate
- 40 of six percent per annum, payable semi-annually.

Exhibit C. 3.

Said bond and purchase money third mortgage shall be drawn in the usual long form employed in the office of David M. Litwin, and shall, amongst their other clauses, contain the usual thirty day interest, sixty day tax and assessment, thirty day prior mortgage and no tax deduction default clauses, and shall also give the party of the second part hereto, its successors or assigns, the privilege of paying off the principal sum thereof at any time before maturity together with interest to the date of payment. 10

It is further agreed and understood that said purchase money mortgage shall provide that the party of the second part hereto, its successors or assigns, shall have the right to raze or demolish the present buildings upon said premises without committing waste, nor rendering the principal sum of said mortgage due and payable. 20

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

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed of Warranty, bond and purchase money third mortgage, and cash payment, shall be delivered and received at the offices of David M. Litwin, #800 Broad Street, Newark, N. J. between the hours of ten in the forenoon and four o'clock in the afternoon on the said first day of October next ensuing the date hereof. 30

It is understood and agreed by and between the parties hereto that the party of the second part will apply to the Zoning Board or any other board having jurisdiction in the City of Newark, 40

Exhibit C. 3.

N. J., for permission to erect an apartment house of not more than five stories and basement in height, upon the within premises and adjoining premises on the south, and it is understood and agreed that if the said application is vigorously prosecuted, and if a permit for the erection of

10 said apartment house is denied on or before September 1, 1928 and the party of the second part shall give written notice to the parties of the first part of the refusal to grant such permit on or before September 2, 1928, the within contract shall be null and void and of no effect, and the deposit of \$500.00 paid upon the signing here-

20 of shall be returned to the party of the second part in full satisfaction of any and all damages, if any, that the party of the second part may be entitled to, and upon the return of the aforesaid deposit, neither of the parties hereto shall have any further rights hereunder, in any other event however, said contract is to remain in full force and effect.

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators;

30 IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals, and the party of the second part has caused these presents to be signed by its President, and attested by its Secretary, and its corporate seal to be hereto affixed the day and year first above written.

ISAAC G. MENDEL (L. S.)
 FLORENCE R. MENDEL (L. S.)

BERWYN ESTATES
 By: JOSEPH ISAACS
 President.

Exhibit C. 3.

Attest:

JOHN J. KELLY
Secretary.

Signed, Sealed and Delivered
in the presence of

10

L. P. KRISTELLER

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

BE IT REMEMBERED, That on this 27th day of June in the year of our Lord One Thousand Nine Hundred and Twenty-eight, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared ISAAC G. MENDEL and FLORENCE MENDEL, his wife, who, I am satisfied are the Grantors in the within Agreement named; and I having first made known to them the contents thereof, they did acknowledge 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 FLORENIE MENDEL, wife as aforesaid, being by me privately examined, separate and apart from her husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

30

LIONEL P. KRISTELLER,
A Master in Chancery of N. J.

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Exhibits C. 4 and C. 5.

AGREEMENT

FOR THE
Sale of Property

10 ISAAC G. MENDEL and FLORENCE MENDEL, his wife,

To

BERWYN ESTATES, a corporation.
Dated, June 27, 1928.

Law Offices of
DAVID M. LITWIN,
800 Broad Street,
Newark, N. J.

20

EXHIBITS C. 4 AND C. 5.

September 1, 1928.

To ISAAC G. MENDEL and FLORENCE MENDEL, his wife AND DAVID LITWIN, ATTORNEY FOR ISAAC G. MENDEL and FLORENCE MENDEL, his wife:

30 YOU ARE HERBY NOTIFIED that the undersigned have vigorously prosecuted the application for a permit for the erection of a five story apartment house upon the premises commonly known as 57-59 Osborne Terrace, Newark, N., J., in accordance with the terms of the contract entered into with Isaac G. Mendel and wife, dated June 27, 1928, and that a permit for the erection of such a building has been refused.

40 You will, therefore, surrender your contract which you hold for the sale of said premises, same now being null and void.

Exhibit D. 1.

The undersigned likewise is ready to surrender its copy of said contract.

BERWYN ESTATES.

By: WILLIAM OKIN,
President.

10

EXHIBIT D. 1.**THIS AGREEMENT**

made the twenty-sixth day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-eight.

BETWEEN LILLIE ECKHOUSE and ELMER ECKHOUSE, her husband, of the City of Newark in the County of Essex and State of New Jersey party of the first part;

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AND BERWYN ESTATES, a corporation of New Jersey, of the City of Newark in the County of Essex and State of New Jersey party of second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Twenty Thousand Dollars (\$20,000.00) to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, its successors and assigns, by Deed of warranty free of all encumbrances except as aforesaid, on or before the first day of October, 1928 next ensuing the date hereof, ALL that certain lot tract, or parcel, of land and premises,

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Exhibit D. 1.

hereinafter particularly described situate, lying and being in the City of Newark in the County of Essex and State of New Jersey being a plot of ground 50 x 150 ft., more or less, on the westerly side of Osborne Terrace, containing a one-family frame dwelling and four-car frame garage commonly known as 61-63 Osborne Terrace.

10 It is expressly understood and agreed that the title to the lands and premises hereby agreed to be conveyed, is not derived from any Martin Act proceedings or any Act for the sale of land for non-payment of the Municipal taxes or assessments, or by adverse possession.

This conveyance is also to be made free and clear of unconfirmed assessments for improvements already made.

20 This conveyance is also to be made subject to restrictions of record, if any, which do not prohibit, however, the erection of the apartment house hereinafter mentioned.

It is further understood and agreed that the party of the second part has entered into a contract this day with ISAAC G. MENDEL and his wife, for the purchase of the adjoining premises. Should the said Isaac G. Mendel and his wife fail to convey the said premises, in accordance with the terms of their written agreement with the party of the second part, then and in that event, the party of the second part shall not be obliged to consummate the within contract, and in that event, the within agreement shall be null and void, and the party of the first part shall return to the party of the second part the deposit hereinafter mentioned, anything herein contained to the contrary notwithstanding.

30 AND the said BERWYN ESTATES, a corporation, for itself, its successors, doth covenant,
40

Exhibit D. 1.

promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that it the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Twenty Thousand Dollars (\$20,000.00) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: 10

\$ 500.00. Five Hundred Dollars, in cash, deposit, the receipt of which is herewith acknowledged.

10000.00. Ten Thousand Dollars, by a mortgage held by the Girard Life Insurance Co. of Philadelphia, which is past due, and is now a lien, and is to be assumed by the party of the second part. 20

6000.00. Six Thousand Dollars, by a purchase mortgage, (second), to be made by the party of the second part, and to be joined in by at least two officers of the party of the second part on the bond, to the party of the first part, for two years, at 6% per annum interest, payable quarterly, to contain the usual interest, tax assessment, insurance installment default and prior mortgage default clauses, and an agreement not to claim credit on the interest payable on the said bond and mortgage by reason of any taxes assessed or to be assessed against the premises, which mortgage is to be drawn by the attorney for the party of the first part, and all fees in connection therewith including recording 30

Exhibit D. 1.

fees, to be paid for by the party of the second part, and is to contain an agreement that the principal can be paid off at any time, with interest to date of payment.

10 3500.00. Thirty-five Hundred Dollars, in cash, at the time of closing, and delivery of deed.

\$20000.00. Taxes, interest on mortgage, if any, insurance premiums, and water rents, to be adjusted and apportioned as of the day of closing, and delivery of deed.

20 The risk of loss or damage to the said premises, by fire or otherwise, until the delivery of said deed, is assumed by the party of the first part.

30 It is understood and agreed by the parties hereto that the party of the second part will apply to the Zoning Board or such other board having jurisdiction in the City of Newark, for permission to erect an apartment house of five stories upon the within premises and adjoining premises, and it is understood and agreed that if said application is vigorously prosecuted, that if the permit is denied on or before September 1st, 1928, the within contract shall be null and void, and of no effect, and the deposit herein given shall be returned to the party of the second part. In any other event, however, the said contract is to remain in full force and effect.

40 The second purchase money mortgage above mentioned, shall contain an agreement that the party of the second part shall have permission to demolish the building on the premises herein conveyed, without hindrance upon the part of the holder of said mortgage.

Exhibit D. 1.

It is understood and agreed that in the event that the first mortgage above mentioned, held by the Girard Life Insurance Company is called for payment because of the demolition of the present building upon the premises herein described, but for no other reason, the party of the first part agree to contribute a sum not to exceed Three Hundred and Seventy-five Dollars (\$375.00) to the cost of re-financing the said \$10,000.00 mortgage. 10

This Contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

And the said party of the part hereby agrees to pay to the licensed and authorized agent a commission of % on the purchase aforesaid. 20

AND IT IS FURTHER AGREED, by the parties to these presents, that the said part of the second part, its successors and assigns, may enter into and upon the said land and premises on the first day of Oct., 1928 next ensuing the date hereof, and from thence take the rents, issues and profits to its and their use.

AND IT IS FURTHER AGREED, by the parties hereto, that the said deed of warranty shall be delivered and received at office of Lionel P. Kristeller, 810 Broad St., Newark, N. J. between the hours of ten o'clock in the forenoon and four o'clock in the afternoon on the said first day of October, 1928 next ensuing the date hereof. 30

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators. 40

Exhibit D. 1.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

Signed, Sealed and Delivered

As to Lillie & Elmer L. Eck-

10 house
 in the presence of

Saul S. Zucker.

ATTEST:

JOHN J. KELLY,
Secretary.

Lillie Eckhouse (L. s.)

Elmer L. Eckhouse (L. s.)

BERWYN ESTATES

20

By

JOSEPH ISAACS,
President.

In consideration of mutual promises and agreements herein stated, we hereby agree to extend the date for the delivery of deed and execution of this contract to _____ at same hour and place.

30 WITNESS hand and seal
 this day of A. D. 19

Exhibit D. 1.

STATE OF NEW JERSEY ss.
 COUNTY OF ESSEX

BE IT REMEMBERED, That on this 26th day of June in the year of Our Lord One Thousand Nine Hundred and twenty eight, before me the subscriber, a Master in Chancery of N J personally appeared Lillie Eckhouse and Elmer L. Eckhouse her husband 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, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed. 10

And the said Saul J. Zucker, a Master in Chancery of New Jersey being by me privately examined, separate and apart from said husband, further acknowledged that signed, sealed and delivered the same as voluntary act and deed, FREELY, without any fear, threats or compulsion of said husband 20

Contract for sale of property.
 Lillie Eckhouse and Elmer Eckhouse,
 her husband,

to

Berwyn Estates, a corporation 30

Dated June 26th, 1928.

NOTE.

Exhibit C. 1 reads exactly like Exhibit D. 1 except that the words "five Story" is left out in the paragraph dealing with the application for a permit.

Exhibit D. 5.

EXHIBIT D. 5.

A fee of \$ Twenty five Dollars has been paid for approval of this plan. Board of Tenement House Supervision per Le Roy 8/23/28

10 BOARD OF TENEMENT HOUSE
SUPERVISION
of the
STATE OF NEW JERSEY

Offices
1060 Broad Street, Newark, N. J.

Filed 8/1/28

Approved Aug 23 1928

Plan 1119 19

20 APPLICATION FOR ERECTION OF NEW
TENEMENT HOUSE

APPLICATION is hereby made to the Board of Tenement House Supervision for the approval of the detailed statement of the specifications and plans herewith submitted for the erection of the Tenement House Houses herein described. All provisions of the law will be complied with whether specified herein or not.

30 Plans and applications must be filed in DUPLI-
CATE

NOTE.—In making application for the approval of plans for a new tenement house the following drawings must be furnished: Plans of all floors, including cellar, basement and roof, elevations showing the height of all stories, window openings, etc., and if necessary transverse and longitudinal sections. All drawings must be to a uniform scale of one-quarter of an inch to the foot and must be on linen tracing cloth or

40

Exhibit D. 5.

blue print paper and must show in clear and legible characters the measurements of all yards, courts, shafts, areas, rooms, stairs, halls, etc.; also all general measurements of the building and the location of all fire escapes. There must also be filed with this application a scale diagram or survey of the property, on linen tracing cloth or blue print paper, showing all boundary lines and dimensions of the property and having the new building and such old ones as will not be removed drawn thereon in outline in their exact location. The proposed occupancy or use of each room or part of building must be shown on plans. 10

All amendments to plans and applications must be made on a separate blank provided for that purpose and where changes, affecting the size of lots, buildings, courts, rooms or halls are made, separate drawings showing such changes must be filed. 20

1. Owner Towne Holding Co Address 24
Branford Pl Newark

2. Architect Lilien & Lilien Address 155
W-72st N Y C.

3. Will the owner or architect superintend the
construction of the building? owner 30

4. Number of buildings to be erected one
Cost of each building \$200,000—
All buildings.....

5. Will the building be fireproof?.....
Non-fireproof? Yes
Frame (not over 40 ft. in height)?.....

6. Is lot a corner no Interior lot yes in fire
limits yes

7. Location. Give city, street and number. (If
there be no number, give the name of street, 40

Exhibit D. 5.

- side on which building is to be located, and name of the nearest intersecting street) 57-63 Osborne Terrace Newark, N. J.
8. State width of widest on which building is to be located. (Measured between building lines) 60'-0"
- 10 9. Is there any other building on the lot, or has a permit been granted for same? no If so, how will it be occupied?..... Give its height.....Distance between buildings.....
10. What per centum of lot will be occupied at ground level? 70% at second tier of beams? 70%
11. Will front facade of building be on building line?.....or back of building line? Yes Distance back of line 10'-0"
- 20 12. Give number of stories (count basement as story if over five feet above grade) Five
13. Give number of apartments on each floor, basement 1 1st 9 2nd 10 3rd 10 4th 10 5th 10 6th 7th.... 8th.... 9th.... 10th.....
14. Will apartments extend from street to yard? no
- 30 15. Give ceiling heights, upper floors 8' 0"..... 8' 6"..... 9' 0" Yes.
16. Give ceiling heights, basement floor 9' 0" Yes 8' 6".....
17. Will ceiling of basement rooms be 5' 0" above curb or ground? Yes
18. How will halls be enclosed? Plasterboard or metal lath (To 12 families above entrance floor).....over 12 and not over 36 above entrance floor) Masonry walls Yes
- 40

Exhibit D. 5.

- (over 36 apartments above entrance floor)
 Fireproof halls and doors to apartments
 Yes.
19. Will each apartment have a kitchen containing seventy square feet (70 sq. ft.); one room containing not less than one hundred and twenty square feet (120 sq. ft.); other rooms not less than ninety square feet (90 sq. ft.). Kitchenettes four feet in depth or breakfast room 55 square feet in area Yes 10
20. Will cellar or basement of building be affected by tide water or drainage water? No If so, will cellar be cemented and asphalted outside?.....
21. Give width of foundation walls 1-8 Brick Stone..... 20
22. Give size of floor beams in each tier, 1st Steel 2nd 3x10 3rd 3x10 4th 3x10 5th 3x10.
23. Will all wood floor beams be properly cross bridged? Yes Will distance between bridging and wall exceed eight feet (8')? No
24. If building is over two stories and basement in height will there be two (2) means of egress for all persons occupying second and third floors? Yes 30
25. Will there be a fire escape or fireproof outside stairway directly accessible to each apartment? Yes.
26. If fire escapes are in court or yard enclosed on all sides will be fireproof passage to street be provided? Yes
27. Will stairs from entrance hall extend to a fireproof bulkhead? Yes Scuttle?.....
28. Give width of treads 10 Height of risers 8. 40

Exhibit D. 5.

29. Will inside cellar stairs be enclosed with fireproof material? Yes Will fireproof self-closing doors be provided at top and bottom of stairs? Will boiler room be enclosed?.....
- 10 30. Will plasterboard or metal lath be used on cellar ceiling? Fireproof Arches Store ceiling?..... Hall ceilings? Fire Proof Arches
31. Will outside walls of non-fireproof buildings be furred? Yes.
32. Will outside walls of non-fireproof buildings be built out two (2) inches at end of floor beams, and beams parallel to outside walls be two and one-half (2½) inches from wall and the space be filled in solid with brick-work? Yes.
- 20 33. Will space between studs in side walls of frame building, less than 3' 0" from lot line, be filled solidly from sill to roof boards with fireproof material?.....
34. Will studs of fore and aft partitions run through the floor beams and rest on the plate of partition below and space between studs of fore and aft partitions and outside stud partitions be filled with fireproof materials at floor levels the full depth of beams and eight (8) inches above same? Yes
- 30 35. Will any non-bearing stud be less than two inches by four inches (2"x4")? No What partitions?.....
36. Will all stud partitions be plastered from floor to ceiling? Yes.
- 40 37. Will there be elevator, dumb-waiter or vent shafts in the building? Elev. & DW. What material will be used for walls of shafts?

Exhibit D. 5.

- Brick Will doors be fireproof and self-closing? Yes Windows wire glass in metal frames? Yes.
38. Will plaster extend to the floor behind all wainscoting? Yes.
39. Will beams and other timbers in party walls be separated from beams or timbers entering from opposite side of walls by at least four (4) inches?..... 10
40. Will party walls be carried two (2) feet above roof?
41. Will beams be framed away from all flues and chimneys? Yes.
42. Will chimneys be carried four (4) feet above roof? Yes
43. Will there be an intake for each inner court and ventshaft? Yes Area for court 3x7 Area for ventshaft..... Will it be unobstructed? Yes Lead to street or yard? Street & Yard 20
44. Will one window in each room in each apartment contain twelve square feet (12 sq. ft.) glazed area and be one-tenth area of room and will top of such window be at least 7' 6" above floor? Yes.
45. Will each water closet compartment be at least 2' 4" wide and have a window not less than one (1) foot by three (3) feet? Yes Have water-proof floor and base? Yes Be provided with gas or electric light Electric or doors glazed?..... What type of water-closet will be installed? Washdown. 30
46. Will entrance door contain five (5) square feet of glass? Yes.
47. Will window area in stair halls equal eighteen (18) square feet? Yes Is there a stair- 40

Exhibit D. 5.

- well?..... Width of stairwell?.....
 Will doors and transoms leading from stair
 hall be glazed with wire glass?.....
- 10 48. Glazed area of skylight? 240' Will it be
 ventilated by ridge ventilators? Yes Mov-
 able louvres?..... Fixed louvres?....
 Both?.....
49. Will floor of cellar or other lowest floor be
 finished with concrete, asphalt or other
 similar material as required by law? Yes.
50. Will cellar ceiling and walls be painted or
 whitewashed? Whitewashed.
- 20 51. Will all yards, courts and shafts, lighting or
 ventilating basement living rooms, be car-
 ried six (6) inches below floors of such
 rooms? Yes Be paved? Yes graded and
 drained? Yes.
52. Will the walls of all yard courts, inner
 courts and shafts be of light colored brick
 or stone?..... If not, will they be
 painted or whatewashed? Whitewashed.
- 30 53. Will air space under building be at least
 2' 0" in the clear (Where no cellar or base-
 ment exists?)..... Will it be enclosed?
 Yes Will it be ventilated? Yes Will
 ground be cemented?..... Will floor
 above be double with building paper be-
 tween floors? Yes.
54. Will there be a sink with running water in
 each apartment? Yes.
55. Will an 18" clear air space be provided be-
 tween ceiling and roof beams and will it be
 ventilated by louvres? Yes
- 40 56. Will leaders be provided for all roofs? Yes
 Will they be connected to sewer Yes Will
 they discharge under sidewalk to street?...

Exhibit D. 5.

57. Is there a public sewer in the street? Yes
If not, what disposition will be made of
sewage?.....
58. Are there water mains in the street? Yes
If not, what provision will be made for
water supply?..... Will roof tanks be
provided? No Power or hand pumps be 10
used?.....
59. Is there a local board or office exercising
jurisdiction over the construction of build-
ings? Yes.
60. Is there a local board or office exercising
jurisdiction over plumbing? Yes.

REPORT ON EXAMINATION

Plan No. 1119

20

Newark, N. J., Aug 23 1928

To the Board of Tenement House Supervision:

GENTLEMEN—I respectfully report that I
have carefully examined the accompanying draw-
ings and these specifications with attached dia-
gram, and find that they conform to the pro-
visions of the law.

Respectfully submitted,

30

E R Le Roy Plan Examiner.

40

Exhibit D. 5.

CERTIFICATE OF APPROVAL

10 THIS IS TO CERTIFY that the within detailed statement of specification, and a copy of the plans relating thereto, have been submitted to the BOARD OF TENEMENT HOUSE SUPERVISION and are hereby approved on this 23 day of Aug., 1928.

BOARD OF TENEMENT HOUSE SUPERVISION

(SEAL)

Per C Roy Swain
Secretary

FINAL REPORT

Newark, N. J.,.....19

20 To the Board of Tenement House Supervision:
GENTLEMEN—I respectfully report that the work on the herein described premises was begun on the.....day of.....19...., and completed on the.....day of.....19..., and that said premises conform in all respects to the law.

Respectfully submitted,
.....Inspector.

30

40

Exhibit D. 7.

EXHIBIT D. 7.

Form No. 1

FRAME AND NON-FIREPROOF BUILDINGS.

Application for Building Permit (to be Made Out
in Duplicate in Ink and Submitted Together **10**
With Two Sets of Plans.)

Application is hereby made to the Superintendent of Buildings of the City of Newark for the approval of the detailed statement and plans herewith submitted for the construction of the building, or additions, herein described. All provisions of the Building Code and Building Zone Ordinance shall be complied with in the construction of said building, or additions, whether specified herein or not. **20**

JOHN J. KELLY,
(Sign here) Towne Holding Co.

(If a corporation, give name of company, also name and title of responsible officer.)

Date Aug. 22, 1928. Per Lilien & Lilien, Architect or Agent.

New Building? Yes. Addition?

1. Location (Street and Number) 57-63 Osborne Terrace. **30**
2. Cost of Construction \$200,000.
3. Use District Res. Height District 30. Area District E.
4. How will proposed building be occupied? Dwell. Present Building, how occupied?
5. If dwelling, number of families? 49. Number of rooms in smallest apartment?.....
6. How are other Buildings on lot occupied? None. (Present to be removed). **40**

Exhibit D. 7.

7. Number of stories of proposed Building? 5.
Height, No. of feet 60. No. of stories of
present Building.....
8. Are exterior walls to be of brick? Yes.
FrameStone?Steel
.....Hol. Tile?.....Re-Con-
10 concrete?Concrete Block?
9. Describe construction of first floor. (See
Sec. 23, par. 9.) conc. slab.
10. Will Building be provided with sprinklers?
(See Sec. 22, pars. 1 and 2.) No.
11. Give area of Building in square feet. 10,500.
12. Give over-all dimensions if completed Build-
ing. 100x128.
13. Will fire walls be provided? (See Sec. 350.)
No.
- 20 13A. Give greatest distance between fire walls.
(See Sec. 22, par. 4.)
14. Total percentage of lot to be occupied at
ground level? 70.
15. Total percentage of lot to be occupied at
second story level? 70.
16. Rear Yard depth at first story? 12-0. At
second story? 12-0.
17. Side Yard width at first story?At
30 second story?.....
- 17A. Side Yards width at first story?.....At
second story?.....
18. Inner Courts dimensions at first story?
26' 8"x27' 10" 29-4x26-4. At second story?
Same.
19. Outer Courts dimensions at first story?
7-0x30-6. 6-6x38-0. At second story? Same.
20. Will Building be erected on front or rear
of lot? Front. Size of lot? 100x150.
- 40

Exhibit D. 7.

- 21. Prevailing set-back of furthest projections in block?No. of feet?
- 22. Give set-back of furthest projection from street line? 10-0. No. of feet? 10-0.

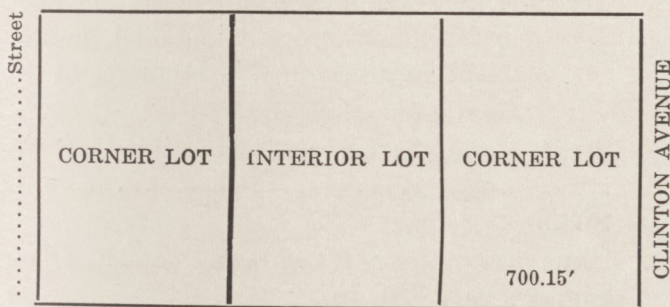
Note:—In C, D and E Residence Districts, building must observe the prevailing set-back in the block.

10

On Diagram below indicate existing and proposed buildings.

REAR END OF LOT

100'-0"



20

It is certified that the foregoing is a true copy of the original application to the Building Department on file with the Board of Adjustment.

R. B. RANKIN,
Secretary.

30

LOADS—ARTICLE III.

- 23. Give live loads on floors. (See Sec. 30.) 1st floor 60. 2nd floor 60. 3rd floor 60. 4th floor 60. 5th floor 60. Roof 50.
- 24. How are ends of girders and trusses supported? (See Sec. 32.) Col.—walls.

40

Exhibit D. 7.

DEMOLITION, ETC.—ARTICLE V.

25. Will existing building be taken down or removed? (See Sec. 53.) Yes.
26. Will sidewalk shed be erected? (See Sec. 54.) No.
- 10 27. Will floors be covered during construction? (See Sec. 58.) Yes.

EXCAVATION AND SOIL CAPACITIES—

ARTICLE VI.

Note:—Upon completion of excavation and before footings are installed, notice shall be given to this Department so that soil conditions may be inspected.

- 20 28. What is the character of the ground? Rock
.....claysandetc.
earth.
29. Have borings or tests been made? (See Sec. 69, par. 3.) No.
30. Will the foundation be laid on earth, rock or piles? (See Secs. 70-71.) Earth.
31. Will there be a cellar? Yes.
32. What will be the depth of foundation walls below curb level or surface of ground? (See
30 Sec. 65.) 4-0.
33. Will adjoining property be supported by underpinning or retaining walls? (See Sec. 65.) No.

Exhibit D. 7.

WOOD CONSTRUCTION—ARTICLE VII.

34. Give height of wood sills above grade? (See Sec. 77.).....
35. Of what timber will frame be constructed? (See Sec. 76.) Fir. Will building be sheathed?.....
36. Will frame construction be mortised and tenoned? (See Sec. 78.).....How braced?.....
37. Size of outside studs. (See Sec. 82.)..... Distance apart on centers..... Corner posts.....sillsplates tiesrafterships and valleys.....
38. Will wood trusses be used?.....
39. How will members be connected? (See Sec. 83.)..... Give size, longest span and distance between centers of joists, girders and columns.

WOOD FLOOR BEAMS (See Sec. 79)				WOOD GIRDERS		
FLOORS	See Sec. 79, Par. 1. Size	Longest Span Between Supports?		See Sec. 79, Par. 3. How Bridged?	Longest Span Between Supports Centers?	
		Centers?	Centers?		Size	Centers?
1st Floor	concrete arches					
2nd Floor.....	3 x 10	20-0	16	2 x 2		
3rd Floor.....	3 x 10	20-0	16	2 x 2		
4th Floor.....	3 x 10	20-0	16	2 x 2		
5th Floor.....	3 x 10	20-0	16	2 x 2		
Roof Beams	3 x 10	20-0	20	2 x 2		

40. How will beams be anchored? (See Sec. 79, par. 4.) Regular.
41. Will end of floor and roof beams rest on stud partitions? No. Brick partitions? Yes. Iron girders? Yes.
42. Size of headers and trimmers? (See Sec. 79, par. 5) Double.

Exhibit D. 7.

43. Will headers and trimmers be hung in stirrup irons? (See Sec. 79, par. 2.) Yes.
44. Of what material will main fore and aft supports be constructed? Brick.

MASONRY—ARTICLE VIII.

- 10 45. Trench walls, depth of?.....Thickness of?.....
- 45A. What will foundation wall be built of? Brick. What kind of mortar used? (See Sec. 94.) Cem.
46. Give thickness of foundation walls. (See Secs. 109 and 110.) 1'-8"
47. Footings will be of conc. Depth of Footings? 16" Width of Footings? (See Sec. 106.) 2'-8"
- 20 48. Materials used for footings, and proportions? (See Sec. 95.) Conc. 1-2½-5.
49. Of what material will upper walls be constructed? (See Sec. 417.) Brick.
50. Give composition of mortar. (See Secs. 91-93.) 1 cem., 2 sand.
51. What will be the material of the front of building? Brick & terra cotta.
52. Will bearing walls faced with brick be bonded? Yes. How? (See Secs. 102-118.) Headers.
- 30 53. Give thickness of ashlar. (See Sec. 118.)Thickness of backing?
54. Will any part of front, side, interior or rear walls be supported on piers or columns? Yes.
55. Give size of piers.....Height of piers. (See Sec. 115.).....
- 40 56. Give size of columns. 6" H & 8" H cols.

Exhibit D. 7.

57. Size of cap stones.....Size of bond stones.....Size of bond plates.....
58. Parapet walls, thickness of? (See Sec. 128.)
8" How many feet above roof? 2'-0"
59. Give material of coping. Terra cotta & glazed tile.

Height of Stories	See Secs. 116-117			See. Sec. 125, Par. 1	See. Sec. 126, Par. 2
	Thickness of Front Wall	Thickness of Side Wall	Thickness of Rear Wall	Thick- ness of Partition Walls	Thickness of Curtain Wall
9-0 Basement.....	1'-8"	1'-8"	1'-8"	1'-4"	
9-0 1st Story.....	1' 4"	1'-4"	1'-4"	12"	
9-0 2nd ".....	1'-4"	1'-4"	1'-4"	12"	
9-0 3rd ".....	12"	12"	12"	12"	
9-0 4th ".....	12"	12"	12"	8"	
9-0 5th ".....	12"	12"	12"	8"	

REINFORCED CONCRETE—ARTICLES
X AND XI.

60. Submit detailed plans of reinforced concrete work.

IRON AND STEEL CONSTRUCTION—
ARTICLE XII.

61. Submit framing plans of iron and steel construction.
62. Submit detailed plans of iron and steel fire-proofing.

ROOFING AND ROOF STRUCTURES—
ARTICLE XIII.

63. Will roof be peak, flat or mansard? Flat.
64. Give material of roofing to be used on proposed building or addition. (See Sec. 236.)
Slag.

Exhibit D. 7.

(Note:—Fireproof material required on all buildings).

- 64A. Sides of dormers how fireproofed?.....
65. What will be the material of cornices and gutters? (See Sec. 237.).....
- 10 66. Will leaders be connected to sewer? (See Sec. 238.) Yes.
67. Will bulkhead or scuttle be provided? (See Secs. 240 and 241.) Bulkhead How constructed, describe below: Brick.
68. Will roof be provided with snow guards? (See Sec. 242, par. 4.) No.

BUILDINGS OF PUBLIC CHARACTER—
ARTICLE XIV.

- 20 69. Will any part of the building be used as an assembly hall? (See Sec. 246.).....

EXIT FACILITIES—ARTICLE XVII.

70. Give number of stairs. (See Sec. 304.) 2.
71. Give width of stairs. (See Sec. 304, par. 10) 3'-6"
72. Give number of occupants—each story—1st
.....2nd3rd4th
30 5th.....
73. Will fire escapes be provided? (See Secs. 288 and 293.) Yes. What kind? Iron.
74. Will exits from the cellar be provided to outside of building? (See Sec. 303, par. 6.) Yes.

ELEVATORS—ARTICLE XVIII.

- 40 75. Will elevators, escalators or dumbwaiters be installed? Yes.

Exhibit D. 7.

SAFEGUARD AGAINST SPREAD OF FIRE.
ARTICLE XIX.

- 76. Hallway enclosures—material of walls
Brick. Thickness 8" & 12" Construction
of floors in stair hall. (See Sec. 352, par. 5;
Sec. 304, par. 6.) Rein. concrete. 10
- 77. Will walls of hallway enclosures extend 3
feet above roof? (See Sec. 352, par. 12.)
Yes. Skylight over. (See Sec. 352, par.
13.) Yes. How glazed? Clear glass.
- 78. Will openings in hallway enclosure be pro-
vided with fireproof doors? (See Sec. 355,
par. 5.) 2" hardwood doors.
- 79. Will outside window frames and sash be of
metal? (See Sec. 357.) No.
- 80. Will fire stops be provided as per Code? 20
(See Sec. 359.) Yes.
- 81. What will be the material of light and vent
shafts? (See Sec. 353.).....Thickness
of.....Skylight over.....
- 82. What will be the material of dumbwaiter
shaft? (See Sec. 352.) Hollow tile. Thick-
ness of 6" Skylight over? Yes.
- 83. What will be the material of elevator shaft?
(See Sec. 352, par. 10.) Brick. Thickness
of 8" & 12" & 16" Skylight over. (See Sec. 30
352, par. 13.) Yes.

LIGHT AND VENTILATION—
ARTICLE XX.

- 84. How will bathroom and toilets be ventilated?
(See Sec. 367.) Windows.

Exhibit D. 7.

CHIMNEYS—ARTICLE XXI.

85. How many inches of brickwork around flues?
(See Sec. 374, par. 4.) 8.

Note:—At least eight inches of brick must
be provided around boiler flues; also
shown on plans).

- 10 86. Flues—Chimneys lined with tile? (See Sec.
374, par. 5.) Yes.
87. How will hearth be constructed? (See Sec.
375, par. 3.).....

It is certified that the foregoing is a true copy
of the original paper on file with the Board of
Adjustment.

R. B. RANKIN,
Secretary.

20

PROJECTIONS BEYOND BUILDING LINE—
ARTICLE XXIII.

88. State character of all projections beyond
building line. None.

MISCELLANEOUS—ARTICLE XXV.

89. How will ceilings be covered? (See Sec.
428.) Cellar Conc. ashes. 1st.....
20 2nd3rd 4th.....
5th
90. What toilet facilities will be provided? (See
Sec. 434.) Regular.
91. Of what material will bay and show win-
dows be constructed? (See Sec. 433.).....
92. Of what materials will ceilings be con-
structed and covered? (See Sec. 428.).....
93. Of what materials will partitions be con-
structed and covered? (See Sec. 428.).....
- 40

Exhibit D. 7.

- 94. State if any hot air, steam or other furnaces. Steam. Lighting equipment? Elec.
- 95. Remarks: State clearly all particulars, including character of alterations or additions, not mentioned in above application.....
- Report of Inspector: 8/23/28. Rejected—Area, Height & number of families exceeded. F. B. per W. F. 10
- Plan Examiner's Memo:.....
- Permit No.DistrictFee

APPLICATION

DEPARTMENT OF PUBLIC SAFETY

Division of Buildings 20
Newark, N. J.

FOR A PERMIT TO CONSTRUCT NEW BUILDINGS

or ADDITIONS

Location No. 57-63 Osborne Ter.
 Owner Towne Holding Co.
 Owner's Address 24 Branford Pl.
 Contractor 30
 Architect Lilien & Lilien.

Exhibit D. 8.

EXHIBIT D. 8.

Forms for Notification of Property Owners
BOARD OF ADJUSTMENT
City Hall, Newark, N. J.

Sir:

10 Your application under the Building Zone Ordinance, in re: premises 57-63 Osborne Ter., has been given Cal. No. 132-28-H.

Below is a copy of a form letter, of which you must make the necessary copies, and then send one to each of the owners of adjoining and neighboring property defined in Article VI, Section 2, of the Rules of the Board (a copy of which is enclosed), and within five days you must file in this office a verified statement that you have
20 served by registered mail or personal service a copy of this notice on each of such owners, together with the names and addresses of those so notified.

Further, a public hearing will be held on this application at 2 P. M., in the Commissioners' Chamber, 2nd floor, City Hall, on Thursday, Sept. 6, 1928, and you must be present either in person, or by agent, or attorney.

Respectfully,

30

(Signed) R. B. Rankin
Secretary.

40

Exhibit D. 8.

NOTICE TO BE SERVED ON OWNERS OF
PROPERTY AFFECTED.

Please Take Notice:

That an application has been made by Herbert Lilien on behalf of Towne Holding Co. for a variation from the requirements of the Building Zone Ordinance so as to permit a 5-story apartment house on the premises 57-63 Osborne Ter., and this notice is sent to you as an owner of property in the immediate vicinity. This application is now No. 132-28-H on the Clerk's Calendar, and a public hearing has been ordered for Thursday, Sept. 6, 1928, at 2 P. M., in the Commissioners' Chamber, 2nd floor, City Hall; and when the calendar is called you may appear either in person, or by agent, or attorney, and present any objections which you may have to the granting of this application.

10

20

This notice is sent to you by the applicant, by order of the Board of Adjustment.

Respectfully,

Herbert Lilien
Applicant.

It is certified that the foregoing is a true copy of the original paper on file with the Board of Adjustment.

30

R. B. Rankin,
Secretary.

40

Exhibit D. 8.

FORM FOR PROOF OF SERVICE

STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss.

10 Herbert Lilien of full age, being duly sworn according to law, deposes and says, that he resides at 155 West 72nd St., in the City of New York in the County of New York and State of New York; that he is the applicant in a proceeding before the Board of Adjustment, City of Newark, being an application under the Building Zone Ordinance, and which has the Calendar Number 132-28-H and relates to premises 57-63 Osborne Ter.; that he gave notice of this proceeding to each and all of the owners of property affected by said application, by personal service
20 or by registered mail on Aug. 28, 1928, a true copy of which is attached to this affidavit.

Sworn to before me, this 29th
day of Aug. 1928.

Clarence Lilien
Essex County

RULES OF THE BOARD OF ADJUSTMENT

30 Article VI., Section 2.

As provided in Article III, Section 4, the applicant shall notify on the proper form each of the property owners entitled to notice of the application. Unless otherwise directed by the Board, the property owners entitled to such notice as being immediately affected shall be deemed to be the owners of:

40 (a) every frontage, in a business or residence district, on the same side of the street or streets

Exhibit D. 8.

upon which the proposed building or use shall have a frontage, entrance or exit, in either direction, within a distance of two hundred (200) feet from the frontage, entrance or exit of the proposed building in use;

(b) every frontage, in a business or residence district, directly opposite the frontage specified in paragraph (a), including every frontage opposite the frontage, entrance or exit of such proposed building or use; 10

(c) every frontage, in a business or residence district, of property, any part of which is within fifty (50) feet of the rear or any side of the lot or plot on which the proposed building or use is located, and which is not already included under paragraph (a) or (b);

provided the Board may require notice of application sent to the owners of such additional frontage as it may deem to be affected. 20

It is certified that the foregoing is a true copy of the original paper on file with the Board of Adjustment.

R. B. Rankin,
Secretary.

30

4)

Exhibit D. 9.

EXHIBIT D. 9.

**BOARD OF ADJUSTMENT
City Hall, Newark, N. J.**

Cal. N. 132-28-H Filed 8.23 1928
Hearing 9.6 1928
10 Disposition Denied 10.4.28

Notice:—This application must be TYPEWRIT-
TEN, filed within sixty (60) days of the order,
accompanied by necessary data, together
with a fee of \$2.00

Application for Variation from the Requirements
of the Building Zone Ordinance

To the Board of Adjustment:

20 Application is hereby made for a variation
from the requirements of Sections of
the Building Zone Ordinance to erect a 5-story
apartment house in accordance with the plans
filed herewith.

Attached hereto is a copy of the decision ren-
dered by the Superintendent of Buildings on
August 23, 1928 in acting on this matter.

DESCRIPTION OF PROPOSED BUILDING

30 Premises affected known as 57-63 Osborne Ter-
race, Newark, N. J.
Applicant, Herbert Lilien, Address, 155 West
72nd St., New York City.
Owner, Towne Holding Company, John J. Kelly.
Address 24 Branford Place
Less Address
Use District Res. Height District 30 Area Dis-
trict E
Occupancy (of each floor) apartments
40 Size of lot 100 x 150

Exhibit D. 9.

Size of Building: (at street level) 100 feet front
128 feet deep

Height of Building: 5 stories 60 feet

Set back from property line 10 feet. From side
(if corner lot)feet.

Has there been any previous appeal involving
these premises? no

10

If so, state date of filing, character of appeal
and disposition.

It is certified that the foregoing is a true copy
of the original application filed with the Board
of Adjustment.

R. B. Rankin

Secretary, Board of Adjustment.

Attached hereto and made a part of this appli-
cation, I submit the following:

20

(Note—All these papers must be submitted
with the application.)

- (a) COPY OF DECISION OR ORDER OF
ADMINISTRATIVE OFFICIAL on
which application is based.
- (b) A TYPEWRITTEN STATEMENT of
the principal points on which I base my
application, with description of pro-
posed work, if any.
- (c) ONE COMPLETE SET OF PLANS of
the proposed building.
- (d) SIX COPIES OF A BLOCK DIAGRAM
with street numbers, showing the char-
acter and occupancy of all property
within two hundred (200) feet, with
points of compass indicated.

30

40

Exhibit D. 9.

(Note—These must be blue prints, on paper
8½" x 13".)

- (e) A FULL LIST OF NAMES AND ADDRESSES OF OWNERS of all property shown on block diagram, and indicating property owned.
- 10 (f) COPY OF NOTICE to the Superintendent of Buildings that I have appealed.

I hereby depose and say that all of the above statements and the statements contained in the papers submitted herewith are true.

Sworn to before me, this 23rd
day of Aug. 1928

Clarence Lilien

20

(Signed) Herbert Lilien
(Applicant to sign here.)

AFFIDAVIT OF OWNERSHIP

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

30 John J. Kelly of full age, being duly sworn according to law on his oath deposes and says, that he resides at 24 Branford Place in the City of Newark in the County of Essex and State of N. J., that he is the owner in fee of all that certain lot, piece or parcel of land situated, lying and being in the City of Newark aforesaid, and known and designated as Number 57-63 Osborne Terrace and that he hereby authorizes Herbert Lilien to make the annexed application in his behalf, and that the statements of fact contained in said application are true.

40

Exhibit D. 10.

Sworn to before me this 23rd
day of Aug. 1928

Clarence Lilien

(Signed) John J. Kelly

NOTE:—Upon the filing of this application with accompanying papers you will be advised of the date of Hearing and will be furnished a form of notice, copies of which you must send by registered mail to all property owners affected, and you must file affidavit of service within 5 days. 10

Form of Notice supplied192...

It is certified that the foregoing is true copy of the original application filed with the Board of Adjustment. 20

R. B. Rankin,
Secretary.

EXHIBIT D. 10.

Record Title.

Lillie E. Eckhouse Fee Simple #33 R 44-549
Isaac G. Mendel Fee Simple #34 E 67-300 30

Subject

Right of curtesy of Elmer Eckhouse
Right of dower of Florence Mendel

Mortgages

R 56-564 10,000 Girard Life Insurance Co.
V 46-44 4,000 Washington Trust Co.

Restrictions

Y-25-498 and deeds subsequent thereto.
K-26-219 and deeds subsequent thereto. 40

Exhibit D. 10.

Questions:

- M-14-568 Description varies from Osborne map.
 Maiden names &c of grantee women.
 A 39-22 party of the first part ever divorced?
 A 61-509 party of the first part ever divorced?
 E 67-300 party of the first part ever divorced?
- 10 No record of death of Frances R. Mendel.
 No collateral tax receipt or waiver on file.
 Assignment 33-369 Power to assign. Note Cr. &
 Dr. in account.
 M 14-568 No record of Tay's death in Essex Sur-
 rogate's office.
 No record of Tay's heirs at law &c. in Essex Sur-
 rogate's office.
 Record from City Hall of ordinance changing
 line of Clinton Avenue.
- 20 Dated: March 13, 1929 9 A. M.

30

40

Exhibit D. 10.

CERTIFICATE

Deeds, Mortgages, Lis Pendens:

George T. Tay	6-1-69	10-1-85	
Harriet A. Tay)			
A. N. Down)			
Jennie L. Tay)	6-1-69	10-1-85	10
Harriet B. Tay)			
Charles F. Tay)			
Henry H. Miller, trustee	1-22-86	5-23-89	
James H. Osborne)	5-23-89	8-4-91	
Robert A. Osborne)			
William P. Cleaver	3-27-91	5-29-99	
Gabriel L. Feldman	5-17-99	7-5-05	
Charles Walter	7-3-05	4-12-06	
Annie Decker	4-11-06	4-2-09	
Lillie E. Eckhouse	4-1-09	date	20
E. Alexander Under- wood	6-22-91	2-25-19	
Guido Cavallaro	2-24-19	2-25-19	
Sarah A. Underwood	2-24-19	6-2-20	
Alexander Luban	5-21-20	9-1-22	
Isaac G. Mendel)	8-1-22	date	
Frances R. Mendel)			

Dated: March 13, 1929—9 A. M.

30

40

Exhibit D. 10.

Certificate #2

Assignments, Releases, Discharges.

	Peter Sanford	6-1-69	10-1-85
	Henry H. Miller, Admin.	12-19-75	4-25-83
10	Henry H. Miller, trustee	9-19-82	10-1-85
	Girard Life Insurance Co.	3-6-26	date
	Alexander Luban	8-1-22	5-1-23
	Washington Trust Co.	4-25-23	date

Judgments, Recognizances, Contracts.

	Annie Decker	3-15-09	4-2-09
20	E. Alexander Under- wood	3-15-09	2-25-19
	Guido Cavallaro	3-15-09	2-25-19
	Sarah A. Underwood	3-15-09	6-2-20
	Alexander Luban	3-15-09	9-1-22
	Frances R. Mendel)		
	Isaac G. Mendel)	twenty years	
	Lillie E. Eckhouse)		

Dated: March 13, 1929—9 A. M.

30

Warranty Deed

Peter Sanford and Book M-14-Page 568
Rhoda, his wife, Dated: June 1, 1869
to Ack'd: June 12, 1869
George H. Tay Rec'd: Aug. 30, 1869
Cons. \$17,000.00

Premises in the Township of Clinton.
Beginning on the southerly side of the road
leading from Newark to Irvington (formerly

40

Exhibit D. 10.

Camptown) at the northeast corner of land formerly belonging to Nathaniel Camp, deceased, (nearly oposite the house where Samuel Baldwin lived) and from thence running (1) along the said road south seventy degree thirty minutes east 5.55 chains to land now or formerly owned by John Hedden; thence (2) along the line of said Hedden's land south 21 degrees forty-five minutes west 18.30 chains to lands of Hugh K. Toler; thence (3) running north sixty-eight degrees thirty minutes west 5.51 chains; thence (4) north 21 degrees forty-five minutes east 18 chains to the place of Beginning.

Ctg. 10- $\frac{3}{4}$ acres, more or less.

Same as deed H-13-321

Subject to \$6000.00 mortgage (S 4-548)

20

Mortgage

George H. Tay	and	Book H-5-Page 300
Harriet A., his wife		Dated: June 1, 1869
to		Ack'd: July 16, 1869
Peter Sanford		Reg. August 30, 1869
		Cons. \$11,000.00

Premises same as described in deed M-14-568 and refers thereto.

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Exhibit D. 10.

ASSIGNMENT

Henry H. Miller, Ad- Book 33-Page 369
 mix. of Peter San- Dated: September 19,
 ford, dec'd. 1882
 to Ack'd: April 5, 1883
 10 Henry H. Miller, trustee (under the Will Rec'd: April 25, 1883
 of said P. S. dec'd) Cons. \$11,000.00
 of David P. Sanford
 and his heirs.

Assigns H 5-300.

Cov. \$11,000. due.

Foreclosed by Y-22-236.

Re

20 George H. Tay,
 Dec'd.

No record of death or will or heirs at law or next of kin in Essex County Register's office.

Re: Dkt. 15174
 Peter Sanford (Sand- Will U-53
 ford) Date 11-1-73
 Dec'd. Died 12-19-75
 Prob. 1-28-76
 30 Rec. 1-160

1. Directs payment of debts, &c.
 2. I give to my executors hereinafter named the sum of \$20,000 in trust to invest and keep the same invested on first mortgage with bonds, and to pay the interest and income thereof half yearly to my son David P. Sandford, so long as he shall live, and at his death to pay the said sum of \$20,000.00 to the children of my said son, and their lawful representatives, in equal shares,
 40 upon their respectively arriving at the age 21

Exhibit D. 10.

years paying in the meantime to their guardians for their use the interest and income thereof in like equal shares.

3. Gift to Abigail S. Hopper.

4. Life estate to wife Rhoda and at her death I give, devise, and bequeath the said rest, residue and remainder of my estate to my executors hereinafter named. 10

In Trust: to pay income to daughter Hannah, Maria Backus for life and at her death to divide the said property held by them between her children (or their lawful representatives) in equal shares, &c.

Apoints Samuel U. Bond, John N. Tuttle and Edgar E. Bond, executors.

Samuel U. Bond, John N. Tuttle and Edgar E. Bond, renounce 1-7-76 and 1-11-76. 20

Henry H. Miller, qualified as administrator C. T. A. 1-28-76.

Sheriff's Deed.

William H. Brown, Book Y-22-Page 236
Sheriff Dated: January 22,
to 1886

Henry H. Miller, trustee under the will of Ack'd: January 27,
1886

Peter Sanford, dec'd Rec'd: February 24,
of David P. Sanford 1886 30

Cons. \$5000.00

Recites FiFa 10-12-85 out of Chancery
Decree 10-1-85

Henry H. Miller, trustee of David P. Sanford under the will of Peter Sanford, dec'd, complainant; Harriet A. Tay, A. N. Down, Jennie T. Tay, Harriet B. Tay and Charles F. Tay, Defendants.

Premises in the Township of Clinton. 40

Exhibit D. 10.

Described same as in deed M-14-Page 568 and refers thereto.

Sold to pay complainant \$12851.60 on mortgage given by Geo. H. Tay and wife to Peter Sanford, dated 6-1-69

Sale 1-12-86

10 Conf. 1-22-86

B. & S. Deed

Henry H. Miller, trustee under the Will of Peter Sanford, dec'd of David P. Sanford to	Book R-24-Page 306 Dated: May 23, 1889 Ack'd: May 23, 1889 Rec'd: May 22, 1889 Cons. \$8475.00
--	--

20 James H. Osborne and Robert A. Osborne.

Premises in the township of Clinton.
Described same as in deed M-14, page 568.
Ctg. 9.45 acres more or less.

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Exhibit D. 10.

Warranty Deed

James H. Osborne and Book Y-25-Page 498
 Mary A., wife and Dated: March 27, 1891.
 Robert A. Osborne Rec'd: April 2, 1891
 and Lizzie G. wife Ack'd: March 27, 1891.
 to Cons. \$1000.00

William P. Cleaver.

10

Premises in Township of Clinton.

Beginning at a point in the westerly line of Osborne Terrace distant 750.15 feet southerly from the southerly line of Clinton avenue; thence (1) running north 67 degrees 36 minutes west 150 feet to a corner; thence (2) south 22 degrees 24 minutes west fifty feet to a corner; thence (3) south 67 degrees 3 minutes east 150 feet to the westerly line of Osborne Terrace; thence (4) along the same north 22 degrees 24 minutes east fifty feet to the point of Beginning.

20

Being lot #33 on a map of property of James H. & Robert A. Osborne surveyed by Francisco & Barkhorn 12-8-90.

Part of deed R-24, 306.

And the said party of the second part for himself, his heirs and assigns doth hereby covenant to and with the said party of the first part, their heirs, executors and administrators that neither the said party of the second part nor his heirs or assigns shall or will at any time hereafter erect upon the said premises any buildings other than a dwelling house and its appropriate out buildings and the said dwelling house to cost in no case less than \$3,000.00 and to be situated at least twenty feet distant from the line of Osborne Terrace and that no barn shall be erected on said premises within one hundred feet of said Osborne Terrace neither shall they erect or permit upon any part of the said premises any building

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Exhibit D. 10.

to be used for the sale of intoxicating liquors or for any manufacturing business or any hog pen, public laundry, livery stable, meat or fish market or for any purpose that would be considered detrimental, noxious or dangerous to the owners or occupants of the surrounding premises.

10

Warranty Deed

William P. Cleaver Book I-32-Page 401
 and Florence M. wife Dated: May 17, 1899
 to Ack'd: May 27, 1899
 Gabriel L. Feldman Rec'd: May 29, 1899
 Cons. \$1450.00

Premises in the City of Newark.

Described same as in deed Y-25, page 498.
 thereto.

20

Subject to same restrictions as in deed Y-25, page 498 (set out in full).

Subject to \$800.00 mortgage in P-10-450. (Cancelled 7-5-05)

Warranty Deed

Gabriel L. Feldman Book A-39-Page 22
 and Emma B. wife Dated: July 3, 1905
 to Ack'd: July 3, 1905
 30 Charles Walter Rec'd: July 5, 1905.
 Cons. \$1 &c
 Grants &c to their
 heirs and assigns.

Premises in City of Newark.

Described same as in deed Y-25, page 498.

Same as deed I-32, Page 401.

Subject to same restrictions as in Y-25-498 (set out in full).

Subject to paving assessment of \$300.00, confirmed 8-29-04.

40

Exhibit D. 10.

Warranty Deed

Charles Walter and Book X-49-Page 452
 Minnie E., his wife Dated: April 11, 1906
 to Ack'd: April 11, 1906
 Annie Decker (wife of Rec'd: April 12, 1906
 Raymond E. Decker) Cons. \$1 &c 10

Premises in the City of Newark.
 Described same as in deed Y-25, Page 498.
 Same as deed A-39, page 22.
 Subject to same restrictions as in deed Y-25,
 page 498 (set out in full).

Warranty Deed

Annie Decker & Ray- Book R-44, page 549
 mond E., husband Dated: April 1, 1909 20
 to Ack'd: April 1, 1909
 Lillie E. Eckhouse, Rec'd: April 2, 1909
 wife of Elmer L. Cons. \$1 &c
 Eckhouse.

Premises in the City of Newark.
 Described same as in deed Y-25, page 498.
 Same as deed X-49, 452.
 Subject to the restrictions as to the use of said
 lands contained in deed X-49, page 452.
 Subject to \$6000.00 mortgage held by Mary S. 30
 Babcock (S-22-148, cancelled 6-21-17)

Exhibit D. 10.

Mortgage

10 Lillie E. Eckhouse and Book R-56-Page 564
 Elmer L., husband Dated: March 6, 1926
 to Ack'd: March 6, 1926
 Girard Life Insurance Rec'd: March 8, 1926.
 Company, a corpora- Cons. \$10,000.00
 tion.

Described same as in deed R-44-Page 549 and refers thereto.

Warranty Deed

20 James H. Osborne and Book K-26-Page 219
 Mary A., his wife, Dated: June 22, 1891
 Robert A. Osborne Ack'd: June 22, 1891
 and Lizzie G., his Rec'd: August 4, 1891
 wife Cons. \$900.00
 to
 E. Alexander Under-
 wood

Premises in the Township of Clinton.

30 Beginning at a point in the westerly line of
 Osborne Terrace distant 700.15 feet southerly
 from the southerly line of Clinton Avenue;
 thence (1) running north 67 degrees 36 minutes
 west 150 feet to a corner; thence (2) south 22
 degrees 24 minutes west 50 feet to a corner;
 thence (3) south 67 degrees 36 minutes east 150
 feet to the westerly line of Osborne Terrace;
 thence (4) along the same north 22 degrees 24
 minutes east 50 feet to the place of Beginning.

Being lot #34 on a map of Property of James H. & Robert A. Osborne surveyed by Francisco and Barkhorn 12-8-90.

Part of deed R-24-306.

40 Subject to same restrictions as in deed Y-25,
 498 (set out in full).

Exhibit D. 10.

Warranty Deed.

E. Alexander Under- Book A-61-Page 509
 wood and Sarah A. Dated: February 24,
 wife 1919
 to Ack'd: February 24,
 Guido Cavallaro 1919
 Rec'd: February 25, 10
 1919
 Cons. \$1 &c

Premises City of Newark.

Described same as in deed K-26-219 and refers thereto.

Subject to all liens and assessments now on the premises, as well as subject to the restrictions which are mentioned in said deed to E. Alexander Underwood.

20

Warranty Deed

Guido Cavallaro and Book A-61-Page 510
 Helen, his wife Dated: February 24,
 to 1919
 Sarah A. Underwood Ack'd: February 24,
 1919
 Rec'd: February 25,
 1919
 Cons. \$1 &c 30

Premises in the City of Newark.

Described as in deed K-26-Page 219.

Same as deed of even date to Guido Cavallaro.
 Subject to \$5500. mortgage as well as all other assessments. (Z-24-288 cancelled 10-20-28)

Subject to restrictions in deed K-26-219 (by reference only).

40

Exhibit D. 10.

Warranty Deed

10 Sarah A. Underwood Book T-63-Page 46
 and E. Alexander, Dated: May 21, 1920
 husband Ack'd: May 21, 1920
 to Rec'd: June 2, 1920
 Alexander Luban Cons. \$1 &c

Premises in the City of Newark.
 Described same as in deed K-26-219.
 Same as deed A-61-510.
 Subject to \$5500.00 mortgage (Z-24-288 cancelled 10-20-28).
 Subject to the effect of existing restrictions affecting the use of the premises.
 Signs E. Alex Underwood.

20

Warranty Deed

Alexander Luban and Book E-67-Page 300
 Fanny, wife Dated: August 1, 1922
 to Ack'd: August 1, 1922
 Isaac G. Mendel and Rec'd: September 1,
 Frances R., wife 1922
 Cons. \$1 &c

30

Premises in the City of Newark.
 Described same as in deed K-26-Page 219.
 Subject to mortgages aggregating \$6500.00 and to the effect of existing record restrictions.
 Same as deed T-63-46 (Z 24-288-\$5500. cancelled 10-20-28) (H 42-316-\$1000. cancelled 10-20-28).
 Signs Fannie Luban

40

Exhibit D. 10.

Mortgage

Isaac G. Mendel and	Book V-46-Page 44	
Frances R. wife	Dated: September 1,	
to	1922	
Alexander Luban.	Ack'd: September 30,	
	1922	
	Rec'd: October 1,	10
	Rec'd: October 1, 192	
	Cons. \$4000.00	
	past due	

Premises in City of Newark.

Described same as in deed K-26-219.

Same as deed to party of the first part of even date. Purchase money mortgage.

Party of the second part agrees to subordinate to new first mortgage of \$6500.00.

20

Assignment

Alexander Luban	Book 160-97	
to	Dated: April 25, 1923	
Washington Trust	Ack'd: April 25, 1923	
Company, a corpora-	Rec'd: May 4, 1923.	
tion.	Cons. \$1 &c	
Assigns V-46-44.		
Cov. \$4000 due.		

30

*Exhibit D. 11.***EXHIBIT D. 11.**

Warranty Deed

James H. Osborne and Y-25-486
 Mary A. wife Dated: March 18, 1891
 Robert A. Osborne and Ack'd: March 18, 1921
 10 Lizzie G. wife Rec'd: April 2, 1891
 to Cons. \$550.00.
 Esther C. Navatier

Premises in the Township of Clinton.

Beginning at a point in the easterly line of Osborne Terrace distant 1150.15 feet southerly from the southerly line of Clinton Avenue; thence (1) running south 67 degrees 36 minutes east 149.68 feet to a corner; thence (2) south 22 degrees 43 minutes west 66.29 feet to a corner; 20 thence (3) north 63 degrees 24 minutes west 73.18 feet to an angle; thence (4) north 63 degrees 47 minutes west 76.36 feet to the easterly line of Osborne Terrace; thence (5) along the same north 22 degrees 24 minutes east 58.60 feet to the place of Beginning.

Being lot #24 on a map of property of James H. & Robert A. Osborne surveyed by Francisco & Barkhorn 12/8/90.

Part of deed R 24-306.

30 And the said party of the second part for herself, her heirs and assigns doth hereby covenant to and with the said parties of the first part their heirs, executors and administrators that neither the said party of the second part nor her heirs or assigns shall or will at any time hereafter erect upon the said premises any buildings other than a double dwelling house and its appropriate outbuildings the said dwelling house to cost in no case less than \$2500.00 and to be situated at least 40 20 feet distant from the line of Osborne Terrace

Exhibit D. 11.

and that no barn shall be erected on said premises within 100 feet of said Osborne Terrace neither shall they erect or permit upon any part of the said premises any building to be used for the sale of intoxicating liquors or for any manufacturing business or any hog pen, public laundry, livery stable, meat or fish market or for any purpose that would be considered detrimental, noxious or dangerous to the owners or occupants of the surrounding premises. 10

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Conclusions of Vice-Chancellor.

CONCLUSIONS OF VICE-CHANCELLOR.

Filed May 13, 1929.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>LILLIE ECKHOUSE, <i>et als.</i>, Complainants,</p> <p style="text-align: center;"><i>and</i></p> <p>BERWYN ESTATES, a corpora- tion, Defendant.</p>	<p><i>On Bill, &c.</i></p> <p><i>On Final Hearing.</i></p> <p><i>Conclusions.</i></p> <p><i>Docket 69, p. 469.</i></p>	<p>13</p>
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<p>Lionel P. Kristeller, Esq., for complainants. Aaron Marder, Esq., for defendant.</p>	<p>20</p>
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SYLLABUS.

1. Where a contract for the sale of lands requires the performance of certain acts by the vendee as a condition precedent to his right to rescind, he cannot rescind before such performance.

2. A notice of rescission not intended to be effective, and not so considered by either party when given, will not later inure to the benefit of the party giving it. 30

BERRY, V.-C.

The bill is filed by the vendor against the vendee for specific performance of a contract of sale of premises known at 61-63 Osborne Terrace, Newark, New Jersey. This cause and the cause entitled "Isaac G. Mendel *v.* Berwyn Estates," Docket 69, page 499, involving a contract for the sale of adjoining premises, were tried together 40

Conclusions of Vice-Chancellor.

on March 19th last and at the conclusion of the hearing I announced that I would advise a decree for the complainants in both suits. The defendant has taken an appeal from these decrees, hence this opinion.

10 The contract involved in this suit was dated June 26, 1928 and provided for a sale of the premises for \$20,000, which was to be paid \$500 on the signing of the agreement; \$10,000 by the assumption of a mortgage of that amount by the vendee; \$6,000 by purchase money mortgage; and the balance of \$3,500 in cash at settlement, which was fixed for October 1, 1928. The contract contained the following provisions:

20 "This conveyance is also to be made subject to restrictions of record, if any, which do not prohibit, however, the erection of the apartment house hereinafter mentioned."

30 "It is understood and agreed by the parties hereto that the party of the second part will apply to the Zoning Board or such other Board having jurisdiction in the City of Newark, for permission to erect an apartment house of five stories upon the within premises and adjoining premises, and it is understood and agreed that if the said application is vigorously prosecuted, that if a permit is denied on or before September 1st, 1928, then the within contract shall be null and void and of no effect and the deposit herein given shall be returned to the party of the second part. In any other event, however, the said contract shall remain in full force and effect."

40 It is admitted by the parties that at the time this contract was made they knew that the zoning ordinance of the City of Newark prohibited the

Conclusions of Vice-Chancellor.

erection of an apartment house on the premises in question, and that it was, therefore, contemplated that upon application to the building department for approval of plans and specifications for an apartment house in this location that application would be denied, and that it would be necessary to appeal the decision of the building department to the Board of Adjustment, which Board had power under certain circumstances to permit the erection of apartment houses in inhibited zones notwithstanding the provisions of the zoning ordinance, for final decision. This was the denial contemplated by the contract, and this fact is also admitted by both parties. Although the contract was executed on June 26, 1928, no application was made to the building department for approval of plans until August 22, 1928. These plans were rejected on August 23, 1928 and an appeal to the Board of Adjustment filed on that day and the hearing on that appeal set for September 6th, then adjourned to September 20th and then to October 4th, on which last day the appeal was denied. On September 4, 1928 the complainants received by mail a notice, of which the following is a copy:

“September 1, 1928.

To Lillie Eckhause and Elmer Eckhause, her husband, and Lionel Kristeller, Attorney for Lillie Eckhause and Elmer Eckhause, her husband:

You are hereby notified that the undersigned, in accordance with contract dated June 26th, 1928, have attempted to procure a permit for the erection of a five story apartment house upon premises commonly known as 61-63 Osborne Terrace, Newark, N. J., and that although the undersigned have

Conclusions of Vice-Chancellor.

vigorously prosecuted the application for same, a permit has been refused.

The undersigned, therefore, demands that you return to them the deposit of \$500.00 paid upon the signing of said contract.

BERWYN ESTATES

By William Okin

Vice President."

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This notice is relied on by the defendant as a rescission of the contract. It is to be noted, however, that under the terms of the contract the vendee was to have the right of rescission only in the event that the application for a permit to erect the apartment house was *vigorously prosecuted and denied on or before September 1, 1928*, and that no application for such permit was made until August 22d. When the notice was served, the application had not yet been acted upon by the Board of Adjustment. Also, by the terms of the contract, it was no part of the vendor's duty to see that such application was promptly made and diligently prosecuted. That was an undertaking by the vendee, one which it might or might not perform as it chose, and for the performance or failure of which it alone was responsible. The only possible construction which to my mind can be placed upon the clause of the contract secondly above quoted is that the vendee should have until September first to make application for a permit and determine its issuance or denial and if such determination was not had by that date, except through the fault of the vendor, the right to rescind on that ground would thence cease. Under the circumstances here disclosed, the right to rescind on that ground did not exist. But quite aside from the construction to be placed upon the contract, and aside from

Conclusions of Vice-Chancellor.

the fact that the notice was not served upon the complainant until September 4th, it is expressly and explicitly admitted on the record by counsel for the defendant that the notice was not intended as a rescission of the contract when it was given. Not having been so intended when given it cannot now be considered as a rescission. It was not so considered by either of the parties at the time of its service. 10

The defendant also contends that the premises in question were subject to a building restriction which prohibited the erection of an apartment house and that, therefore, the complainant was not in a position to convey according to the contract on October 1st, 1928, the day fixed for settlement, but this question has already been disposed of adversely to the defendants by the Court of Errors and Appeals in *Underwood v. Herman & Company*, 82 N. J. Eq. 353, in which the restriction urged by the defendant was construed and held not to prohibit the erection of an apartment house. 20

The defendant also now urges, although no such suggestion was made at the trial, that to compel the defendant to accept a conveyance of the premises at this time would impose upon him undue hardship which this court in the exercise of its discretion should refuse to do; but the answer to this argument, even if it were timely, is that there was no evidence indicating that a decree of specific performance would impose any hardship on the vendee. 30

Conclusions of Vice-Chancellor.

IN CHANCERY OF NEW JERSEY.

<p style="margin: 0;"><i>Between</i></p> <p style="margin: 0;">10 ISAAC G. MENDEL,</p> <p style="margin: 0; text-align: right;"><i>Complainant,</i></p> <p style="margin: 0; text-align: center;"><i>and</i></p> <p style="margin: 0;">BERWYN ESTATES, a corpora-</p> <p style="margin: 0;">tion,</p> <p style="margin: 0; text-align: right;"><i>Defendant.</i></p>	}	<p style="margin: 0;"><i>On Bill, &c.</i></p> <p style="margin: 0;"><i>On Final</i></p> <p style="margin: 0;"><i>Hearing.</i></p> <p style="margin: 0;"><i>Conclusions.</i></p> <p style="margin: 0;"><i>Docket</i></p> <p style="margin: 0;"><i>69/499.</i></p> <p style="margin: 0;"><i>Not to be</i></p> <p style="margin: 0;"><i>printed in</i></p> <p style="margin: 0;"><i>any report.</i></p>
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David M. Litwin, Esq., for complainant.

Aaron Marder, Esq., for defendant.

20 *BERRY, V.-C.*

This is a suit for specific performance of a contract for the sale of premises 57-59 Osborne Terrace, Newark, New Jersey. The contract is dated June 27, 1928, and settlement was to be made thereunder on October 1, 1928. The contract in its pertinent provisions is substantially in the form of that involved in the case of Lillie Eckhause *v.* Berwyn Estates, a corporation, Docket 69, page 496, which was heard in conjunc-

30 tion with this cause. The same evidence was submitted in both cases and a decree for complainant was advised in the instant case for the reasons expressed by me in conclusions filed in the Eckhause case.

Decided May 10, 1929.

Final Decree—Eckhouse Case.

FINAL DECREE.

Filed March 26, 1929.

IN CHANCERY OF NEW JERSEY.

69-496.

13

Between

LILLIE ECKHOUSE and ELMER
ECKHOUSE, her husband,

Complainants,

and

BERWYN ESTATES, a corpora-
tion,

Defendant.

On Bill, &c.

Final Decree.

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This cause coming on to be heard upon bill, answer, and replication, in the presence of Lionel P. Kristeller, solicitor for and of counsel with the complainants, and Aaron Marder, of counsel, Marder & Okin, solicitors for the defendant, and the pleadings having been read, and the proofs of the parties having been heard, and the arguments of counsel having been considered, and the Chancellor being of the opinion that the complainants are entitled to the relief prayed for in the bill of complaint herein, and it satisfactorily appearing to the Court that by virtue of an agreement, in writing, duly made and executed by and between Lillie Eckhouse, and Elmer Eckhouse, her husband, the complainants herein, and Berwyn Estates, a corporation of New Jersey, the defendant herein, bearing date the twenty-sixth day of June, nineteen hundred and twenty-

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Final Decree—Eckhouse Case.

eight, the said defendant agreed to purchase of and from the said complainants, said lands and premises situate, lying and being in the City of Newark, County of Essex, and State of New Jersey, and more particularly described as follows:

- 10 “BEGINNING at a point in the westerly line of Osborne Terrace distant seven hundred and fifty feet and fifteen hundredths of a foot southerly from the southerly line of Clinton Avenue; thence (1) running north sixty-seven degrees thirty-six minutes west one hundred and fifty feet to a corner; thence (2) south twenty-two degrees twenty-four minutes west fifty feet to a corner; thence (3) south sixty-seven degrees thirty-six minutes east one hundred and fifty feet to the westerly line of Osborne Terrace; thence 20 (4) along the same north twenty-two degrees twenty-four minutes east fifty feet to the place of BEGINNING. Being Lot No. 33 on a map of property of James H. and Robert A. Osborne, surveyed by Francisco & Barkhorn, Dec. 8, 1890.”

- Being the same premises referred to in said agreement mentioned, in the language following, 30 to wit:

“Being a plot of ground 50 x 150 ft., more or less, on the westerly side of Osborne Terrace, containing a one-family frame dwelling, and four-car frame garage commonly known as 61-63 Osborne Terrace.”

- and it further appearing that the deed of conveyance is to be made subject to restrictions of record, if any, which do not prohibit, however, the erection of an apartment house, and is to be 40

Final Decree—Eckhouse Case.

made free and clear of unconfirmed assessments for improvements already made, and it further appearing that in said agreement mentioned, the said complainants, Lillie Eckhouse, and Elmer Eckhouse, her husband, agreed to convey the said mentioned lands and premises to the Berwyn Estates, the defendant herein, by deed of warranty, on or before the first day of October, nineteen hundred and twenty-eight, and that the said Berwyn Estates, a New Jersey corporation agreed to pay to the complainants therefor, the sum of twenty thousand dollars (\$20,000.00), by the payment of five hundred dollars (\$500.00), which was paid, as required by the terms of said agreement, and by the payment of the remainder of said purchase price, upon the delivery of the deed, by the payment of thirty-five hundred dollars (\$3,500.00) in cash, and the execution of a purchase money mortgage, in the sum of six thousand dollars (\$6,000.00), to run for a period of two years, at six per cent. per annum, and the balance of ten thousand dollars (\$10,000.00), by taking the premises subject to a first mortgage in said sum of money, held by the Girard Life Insurance Company of Philadelphia, and it further appearing that the complainants herein have always been and still are ready and willing in all things to comply with the terms of said agreement, and have prayed the order or decree of this court, directing the defendant to comply with and fulfill the same, and all things on its part, and this court being of the opinion that the complainants are entitled to the specific performance of said agreement, on the part of the defendant, Berwyn Estates, a New Jersey corporation, as the said complainants have prayed, now, therefore, it is, on this twenty-sixth day of March, nineteen hundred and twenty-nine,

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Final Decree—Eckhouse Case.

ORDERED, ADJUDGED and DECREED, that the said agreement between the complainants and the defendant, dated the twenty-sixth day of June, nineteen hundred and twenty-eight, be in all things specifically performed, by the said defendant, and that the said defendant, by its
10 proper officers, on the tenth day of April, 1929, at the hour of ten o'clock in the forenoon of that day, at the office of Lionel P. Kristeller, 810 Broad street, Newark, New Jersey, pay to the complainants, Lillie Eckhouse and Elmer Eckhouse, her husband, the sum of thirty-five hundred dollars (\$3,500.00), lawful money of the United States, with interest thereon from the first day of October, nineteen hundred and twenty-eight, together with the taxed costs and counsel
20 fees of this court, as herein allowed, and at the same time make, execute, acknowledge and deliver, in due form of law, to the said complainants, Lillie Eckhouse, and Elmer Eckhouse, her husband, its bond, to be joined in by at least two of the officers of the said defendant, in the penal sum of twelve thousand dollars (\$12,000.00), conditioned upon the payment of six thousand dollars (\$6,000.00), in two years from the first day of October, nineteen hundred and twenty-eight,
30 with interest at the rate of six per cent. per annum, and at the same time make, execute, and acknowledge, in due form of law, and deliver to the said Lillie Eckhouse, and Elmer Eckhouse, her husband, a purchase money mortgage on said lands and premises, in the sum of six thousand dollars (\$6,000.00), payable in two years from the first day of October, nineteen hundred and twenty-eight, with interest at the rate of six per cent. per annum, upon the delivery, at the same time and place, by the said complainants, Lillie
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Final Decree—Eckhouse Case.

Eckhouse and Elmer Eckhouse, her husband, to the said Berwyn Estates, a New Jersey corporation, of a deed of warranty, duly executed and acknowledged, by the said complainants, Lillie Eckhouse and Elmer Eckhouse, her husband, conveying to the said Berwyn Estates, a New Jersey corporation, the lands and premises hereinbefore mentioned and described, subject to a mortgage of ten thousand dollars (\$10,000.00), held by the Girard Life Insurance Company of Philadelphia, which mortgage is a past due mortgage, and bears interest at the rate of six per cent. per annum, payable semi-annually, and subject also to restrictions of record, if any, which do not, however, prohibit the erection of an apartment house, and free and clear of unconfirmed assessments for improvements already made; and it is further

ORDERED, ADJUDGED and DECREED, that the complainants herein, do account to the defendant, for all rents, issues and profits of the said aforementioned premises, from the first day of October, nineteen hundred and twenty-eight, until the payment of the purchase price to the said complainants by the said defendant, as herein provided; and it is further

ORDERED, ADJUDGED and DECREED, that in the event that the said title is not closed at the time and place hereinbefore set forth, and in the event that a dispute arises as to the account between the parties hereto, that the delivery of the said deed by the said complainants, to the said defendant, and the payment of the cash, and the delivery of the bond and mortgage hereinbefore mentioned, be made before Hugh B. Reed, one of the Special Masters of this court, to whom the above-entitled cause is hereby referred, the said Special Master to take and state the account be-

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Final Decree—Eckhouse Case.

tween the complainants and the defendant, upon said contract of sale, as of the first day of October, nineteen hundred and twenty-eight; and it is further

10 ORDERED, ADJUDGED and DECREED, that the said complainants, and the defendant, do appear before the said Hugh B. Reed, Special Master as aforesaid, at his office, in the City of Newark, on a day certain, to be fixed by the said Special Master, upon five days' notice thereof, in writing, to the solicitors for the parties hereto, for the purposes set forth in this decree; and it is further

20 ORDERED, ADJUDGED and DECREED, that in the event that the closing of the title hereinbefore set forth takes place before the said Special Master, in accordance with the terms of this decree, that the said Special Master file his report of closing with the Clerk of this Court, with all convenient speed thereafter, and the costs, charges, and fees of such Special Master be added to the taxed costs of the complainants, and all further equity is reserved until the coming in of the said Special Master's report; and it is further

30 ORDERED, ADJUDGED and DECREED, that if at either of the times and places hereinabove mentioned, the said defendant fails or neglects to pay the sum of thirty-five hundred dollars (\$3,500.00), with interest, as aforesaid, together with the taxed costs hereinbefore mentioned, and to deliver the bond and mortgage hereinbefore described, duly executed and acknowledged, upon the tender of said deed, as hereinbefore mentioned and described, the aforesaid sums of thirty-five hundred dollars (\$3,500.00), and six thousand dollars (\$6,000.00), together with interest at the rate
40 of six per cent. per annum, from the first day of

Final Decree—Eckhouse Case.

October, nineteen hundred and twenty-eight, and the taxed costs of this suit, as hereinbefore mentioned, shall be and become, and are hereby impressed as a lien upon the said lands and premises, in favor of the said complainants, Lillie Eckhouse and Elmer Eckhouse, her husband, to the end that the said lands and premises may be sold, pursuant to law, and under and by the direction of this court, to satisfy such lien, and that in case a deficiency should arise upon such sale, that the said defendant, Berwyn Estates, a New Jersey corporation, may be ordered by this court, to pay such deficiency; and it is further

ORDERED, ADJUDGED and DECREED, that a counsel fee of \$500 be and the same is hereby allowed to the solicitor of the complainants, to be taxed as part of the costs of the said complainants, and to be collectible therewith and as part thereof; and it is further

ORDERED, ADJUDGED and DECREED, that within ten days after service upon an officer of the defendant, or its solicitor, of a copy of this decree, and a copy of the complainants' bill of taxed costs, duly certified to by the solicitor of the complainants, that the said defendant pay said costs to the solicitor of the complainants, and that in default thereof, execution issue thereon out of and under the seal of this court, directed to the Sheriff of Essex County, for the amount of such costs, and the costs of such writ of execution.

E. R. WALKER,
C.

Respectfully advised,

MAJA LEON BERRY,
V.-C.

*Final Decree—Mendel Case.***FINAL DECREE.**

Filed March 26, 1929.

IN CHANCERY OF NEW JERSEY.

10 *Between*ISAAC G. MENDEL and FLOR-
ENCE MENDEL,*Complainants,**and*BERWYN ESTATES, a corpora-
tion,*Defendant.**On Bill, &c.**Final Decree.*

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This cause coming on to be heard upon bill, answer and replication, in the presence of David M. Litwin, solicitor for and of counsel with the complainants, and Aaron Marder, solicitor for and of counsel with the defendant, and the pleadings having been read, and the proofs of the parties having been heard, and the arguments of counsel having been considered, and the Chancellor being of the opinion that the complainants

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are entitled to the relief prayed for in the bill of complaint herein, and it satisfactorily appearing to the Court that by virtue of an agreement in writing, duly made and executed by and between Isaac G. Mendel and Florence Mendel, his wife, the complainants herein, and Berwyn Estates, a corporation of New Jersey, the defendant herein, bearing date the 27th day of June, 1928, said defendant agreed to purchase from the said complainants certain lands and premises situate, lying and being in the City of Newark, in the

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Final Decree—Mendel Case.

County of Essex and State of New Jersey, and more particularly described as follows:

“BEGINNING at a point in the westerly line of Osborne Terrace distant seven hundred feet and fifteen one-hundredths of a foot southerly from the southerly line of Clinton Avenue; thence (1) running north sixty-seven degrees thirty-six minutes west one hundred fifty feet to a corner; thence (2) south twenty-two degrees twenty-four minutes west fifty feet to a corner; thence (3) south sixty-seven degrees thirty-six minutes east one hundred fifty feet to the westerly line of Osborne Terrace; thence (4) along the same north twenty-two degrees twenty-four minutes east fifty feet to the place of BEGINNING. Being lot #34 on a map of property of James H. and Robert A. Osborne, surveyed by Francisco & Barkhorn, December 8, 1890.

The within premises being known and designated as 57-59 Osborne Terrace.”

And it further appearing that the deed of conveyance is to be made subject to two mortgages hereinafter mentioned; to restrictions of record, if any, which do not prohibit however, the erection of the apartment house mentioned in said agreement; subject to the provisions of the Building Zone Ordinances of the City of Newark, N. J., to the extent that they are valid, the parties to said agreement however, not admitting their validity.

And it further appearing that in said agreement mentioned, the said complainants Isaac G. Mendel and Florence Mendel, his wife, agreed to convey the said lands and premises to the Berwyn Estates, the defendant herein, by deed

Final Decree—Mendel Case.

of warranty, on or before the first day of October, 1928, and that the said Berwyn Estates, a New Jersey corporation, agreed to pay to the complainants therefor the sum of twenty thousand (\$20,000.00) dollars, by the payment of one (\$1.00) dollar, which was paid as required by the

10 terms of said agreement, and by the payment of the remainder of said purchase price upon the delivery of the deed, by the payment of nine hundred and ninety-nine (\$999.00) dollars in cash; sixty-five hundred (\$6,500.00) dollars by the complainants conveying said premises subject to two mortgages then a lien upon said premises total-

20 ling the sum of sixty-five hundred (\$6,500.00) dollars, which mortgages are past due; and the balance of the purchase price, to wit twelve thousand five hundred (\$12,500.00) dollars, subject however, to the apportionments mentioned in said agreement, by the execution of the bond of the Berwyn Estates, and secured by a purchase money third mortgage, payable two years after the date thereof, with interest at the rate of six per cent. per annum,

And it further appearing that the complainants herein have always been, and still are ready and willing in all things to comply with the terms

30 of said agreement, and that the said defendant Berwyn Estates, a corporation, has refused and failed to perform the said agreement on its part, and the complainants having prayed the order or decree of this Court directing the defendant to comply with and fulfill the terms of said agreement, and all things on its part, and this Court being of the opinion that the complainants are entitled to the specific performance of said agreement on the part of the defendant Berwyn Estates, a corporation, as the said complainants

40 have prayed,

Final Decree—Mendel Case.

Now, therefore, it is, on this 26th day of March, 1929,

ORDERED, ADJUDGED and DECREED, that the said agreement between the complainants and the defendant, dated the 27th day of June, 1928, be, in all things specifically performed by the said defendant, and that the said defendant, by its proper officers, on the 10th day of April, 1929, at the hour of eleven o'clock in the forenoon of that day, at the office of David M. Litwin, No. 800 Broad street, Newark, New Jersey, pay to the complainants, Isaac G. Mendel and Florence Mendel, his wife, the sum of nine hundred and ninety-nine (\$999.00) dollars, lawful money of the United States, with interest thereon from the first day of October, 1928, together with the taxed costs and counsel fees of the complainants as herein allowed, and at the same time make, execute, acknowledge and deliver, in due form of law, to the said complainants, Isaac G. Mendel and Florence Mendel, his wife, the bond of the said defendant Berwyn Estates, in the penal sum of double the amount of the calculation, after taking into consideration that part of the purchase price amounting to the sum of twelve thousand five hundred (\$12,500) dollars, and which is subject to the result of the apportionments mentioned in said agreement (which apportionments shall all be made as of October 1, 1928), and which bond shall be conditioned for the payment of the principal sum thereof, and at the same time make, execute and acknowledge in due form of law, and deliver to the said Isaac G. Mendel and Florence Mendel, his wife, a purchase money third mortgage upon said lands and premises, to be next in priority only to the two mortgages now thereon totalling the sum of sixty-five hun-

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Final Decree—Mendel Case.

dred (\$6,500.00) dollars, and which mortgage shall be in the principal sum equal to the result of the aforementioned calculation, and which said bond and purchase money third mortgage shall be payable in two years from the first day of October, 1928, with interest at the rate of six
10 per cent. per annum, payable semi-annually from October 1, 1928, upon the delivery at the same time and place by the said complainants Isaac G. Mendel and Florence Mendel, his wife, to the said Berwyn Estates, a New Jersey corporation, of a deed of warranty duly executed and acknowledged by the said complainants Isaac G. Mendel and Florence Mendel, his wife, conveying to the said Berwyn Estates, a New Jersey corporation, the lands and premises hereinbefore
20 mentioned and described, subject to the aforesaid two mortgages totalling the sum of sixty-five hundred (\$6,500.00) dollars; restrictions of record, if any, which do not prohibit however, the erection of the apartment house described in said agreement, and subject to the provisions of the Building Zone Ordinances of the City of Newark, N. J., to the extent that they are valid, the parties hereto, however, not admitting their validity,

30 AND IT IS FURTHER ORDERED, ADJUDGED and DECREED, that the complainants herein do account to the defendant for all rents, issues and profits of the said aforementioned premises from the first day of October, 1928, until the payment of the purchase price to the said complainants, by the said defendant, as herein provided,

40 AND IT IS FURTHER ORDERED, ADJUDGED and DECREED, that in the event that the said title is not closed at the time and place hereinbefore set forth, and in the event that a dispute arises as

Final Decree—Mendel Case.

to the account between the parties hereto, that the delivery of the said deed by the said complainants to the said defendant, and the payment of the cash, and the delivery of the bond and mortgage hereinbefore mentioned be made before Hugh B. Reed, one of the Special Masters of this court, to whom the above entitled cause is hereby referred, the said Special Master to take and state the account between the complainants and the defendant upon said contract of sale, as of the first day of October, 1928, 10

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED, that the said complainants and the defendant, by its officers, do appear before the said Hugh B. Reed, Special Master as aforesaid, at his office in the City of Newark, on a day certain to be fixed by the said Special Master, upon five days' notice thereof, in writing, to the solicitors for the parties hereto, for the purpose set forth in this decree, 20

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED, that in the event that the closing of the title hereinbefore set forth takes place before the said Special Master, in accordance with the terms of this decree, that the said Special Master file his report of closing with the Clerk of this Court with all convenient speed thereafter, and the costs, charges and fees of said Special Master be added to the taxed costs of the complainants, and all further equity is reserved until the coming in of the said Special Master's report, 30

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED, that if at either of the times and places hereinabove mentioned, the said defendant shall fail or neglect to pay the sum of nine hundred and ninety-nine (\$999.00) dollars with interest as aforesaid, together with the taxed costs and coun- 40

Final Decree—Mendel Case.

sel fees hereinbefore mentioned, and to deliver the bond and mortgage hereinbefore described, duly executed and acknowledged, upon the tender of said deed, as hereinbefore mentioned and described, the aforesaid sums of nine hundred and ninety-nine (\$999.00) dollars and twelve thousand five hundred (\$12,500.00) dollars, subject to the apportionments mentioned in said agreement as aforesaid, together with interest at the rate of six per cent. per annum upon the full amount thereof, from the first day of October, 1928, and the taxed costs of this suit and counsel fees as herein mentioned, shall be and become, and are hereby impressed as a lien upon the said lands and premises, in favor of the said complainants Isaac G. Mendel and Florence Mendel, his wife, to the end that said lands and premises may be sold pursuant to law and under and by the direction of this Court, to satisfy such lien, and that in case a deficiency should arise upon such sale, that the said defendant, Berwyn Estates, a New Jersey corporation, may be ordered by this Court to pay such deficiency,

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED, that a counsel fee of \$500 be, and the same is hereby allowed to the solicitor of the complainants, to be taxed as part of the costs of the said complainants, and to be collectible therewith and as part thereof,

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED, that within ten days after service upon an officer of the defendant, or its solicitor, of a copy of this decree and a copy of the complainants' bill of taxed costs, duly certified to by the solicitor of the complainants, that the said defendant pay said costs to the solicitor of the complainants, and that in default thereof execution issue there-

Final Decree—Mendel Case.

on out of, and under the seal of this Court,
directed to the Sheriff of Essex County, for the
amount of such costs and the costs of such writ
of execution.

E. R. WALKER,

C. 10

Respectfully advised,

MAJA LEON BERRY,
V.-C.

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Notice of Appeal—Eckhouse Case.

NOTICE OF APPEAL.

Filed April 20, 1929.

IN CHANCERY OF NEW JERSEY.

10 *Between*

LILLIE ECKHOUSE and ELMER
ECKHOUSE, her husband,
Complainants,

and

BERWYN ESTATES, a corpora-
tion,

Defendant.

On Bill, &c.

*Notice
of Appeal.*

*Docket 69,
Page 496.*

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To Lillie Eckhouse and Elmer Eckhouse, her husband, complainants and Lionel P. Kristeller, Esq., their solicitor:

The defendant, Berwyn Estates, a corporation, hereby appeals from the final decree made in the above-entitled cause on the 26th day of March, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

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Said decree was made by the Chancellor on the advice of Vice-Chancellor Berry.

Dated April 19, 1929.

MARDER & OKIN,

Solicitors for Defendant, Berwyn Estates.

AARON MARDER,

Of Counsel with Defendant, Berwyn Estates.

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Notice of Appeal—Eckhouse Case.

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

AARON MARDER,
Of Counsel with Defendant, Berwyn Estates.

Service of a copy of the within notice of appeal acknowledged this 19th day of April, 1929. 10

L. P. KRISTELLER,
Sol. of Complainants.

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Notice of Appeal—Mendel Case.

NOTICE OF APPEAL.

Filed April 20, 1929.

IN CHANCERY OF NEW JERSEY.

10 *Between*

ISAAC G. MENDEL and FLOR-
ENCE MENDEL,

Complainants,

and

BERWYN ESTATES, a corpora-
tion,

Defendant.

On Bill, &c.

*Notice
of Appeal.*

*Docket 69,
Page 499.*

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To Isaac G. Mendel and Florence Mendel, complainants and David M. Litwin, Esq., their solicitor:

The defendant, Berwyn Estates, a corporation, hereby appeals from the final decree made in the above-entitled cause on the 26th day of March, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

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Said decree was made by the Chancellor on the advice of Vice-Chancellor Berry.

Dated April 19, 1929.

MARDER & OKIN,

Solicitors for Defendant, Berwyn Estates.

AARON MARDER,

Of Counsel with Defendant, Berwyn Estates.

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Notice of Appeal—Mendel Case.

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

AARON MARDER,
Of Counsel with Defendant, Berwyn Estates.

Service of a copy of the within notice of appeal acknowledged this 19th day of April, 1929. **10**

(Signed) DAVID M. LITWIN,
Sol. of Complainants.

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Petition of Appeal—Eckhouse Case.

PETITION OF APPEAL.

Filed May 8, 1929.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

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Between

LILLIE ECKHOUSE and ELMER
ECKHOUSE, her husband,
Complainants-Respondents,

and

BERWYN ESTATES, a corpora-
tion,

Defendant-Appellant.

*On Appeal
from the
Court of
Chancery.*

*Petition
of Appeal.*

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To the Honorable The Court of Errors and Ap-
peals in the Last Resort in All Causes:

The petition of Berwyn Estates, the appellant
in the above entitled cause, respectfully shows
that:

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1. Petitioner, find itself aggrieved by a final
decree made in the Court of Chancery by his
Honor Edwin Robert Walker, Chancellor of the
State of New Jersey, bearing date the 26th day
of March, 1929 in a certain cause in said Court
of Chancery wherein said Lillie Eckhouse and
Elmer Eckhouse were complainants and the said
Berwyn Estates, a corporation, was defendant,
in this respect, to wit: That said decree ad-
judges, amongst other things, that the agreement
between complaintants and defendant, dated June
26, 1928, be in all things specifically performed
by said defendant and further adjudges that in

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Petition of Appeal—Eckhouse Case.

the event title is not closed pursuant to the provisions of said decree, and defendant fail and neglect to pay the moneys mentioned in said decree, the said moneys together with interest are impressed as a lien upon the lands and premises in question in favor of the said complainants to the end that said lands and premises may be sold pursuant to law and that in case a deficiency should arise at such sale the defendant may be ordered to pay same and further adjudges that a counsel fee of \$500.00 be allowed to the solicitor of the complainants and that execution issue for complainants' taxed costs. 10

Petitioner appeals from the decree of the Chancellor which decrees as aforesaid upon the ground that same is erroneous in that: (a) It adjudges the complainants entitled to the relief prayed for when it should have denied the relief prayed for in the bill of complaint and dismissed the bill; (b) the contract in question should not have been and should not be specifically enforced for the reasons that (1) the Board of Adjustment denied a permit for an apartment house, (2) time for the procuring of the permit from the Board of Adjustment was not of the essence, (3) defendant sought a permit from the Board of Adjustment as promptly as possible, (4) the contract is inequitable, harsh and oppressive and the enforcement thereof does not do substantial justice, (5) the contract in question is indefinite, (6) the contract is incomplete, (7) the contract is void, (8) enforcement of the contract has unintended harsh consequences, (9) enforcement of the contract has greatly oppressive consequences, (10) the enforcement of the contract works a forfeiture, (11) the premises is question are subject to restrictions and set-back provisions different and more onerous than the 20 30 40

Petition of Appeal—Eckhouse Case.

restrictions stated in the contract, (12) there is doubt in the restrictions, (13) title to the premises in question is not marketable, (14) title to the premises in question is defective, (15) title to the premises in question is doubtful, (16) the premises in question are subject to encroachments, (17) it is likely that the defendant will be exposed to litigation, (18) the complainants failed to prove that they have a good and marketable title, (19) the complainants failed to prove that the premises in question are not subject to restrictions and set-back provisions different and more onerous than the restrictions stated in the contract, (20) complainants failed to prove that title is good beyond a reasonable doubt and will not expose the defendant to litigation, (21) complainants failed to prove that defendant obtained the permit for the apartment house upon which the contract was contingent, (22) complainants failed to prove or show any facts as would entitle them to specific performance despite the fact that defendant could not obtain the permit for an apartment house; (c) the court below at final hearing refused to hear and consider evidence in connection with the defects and doubts in title, etc. and restrictions and set-back provisions different and more onerous than the restrictions provided for in the contract; (d) no counsel fee should have been allowed, and the one allowed as excessive; (e) the suit in the court below was prematurely instituted.

Petitioner therefore prays that said decree of said Chancellor may be wholly reversed and set aside and for nothing holden and that the peti-

Petition of Appeal—Eckhouse Case.

tioner may have such relief in the premises as to this Court may seem proper.

MARDER & OKIN,
Solicitors of Appellant.

AARON MARDER,
Of Counsel with Appellant. 10

Service of a copy of the within petition of appeal is hereby acknowledged this 7th day of May, 1929.

(Signed) L. P. KRISTELLER,
Sol'r of Complainants-Respondents.

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Answer to Petition of Appeal—Eckhouse Case.

ANSWER TO PETITION OF APPEAL.

Filed May 8, 1929.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

Between

LILLIE ECKHOUSE and ELMER
ECKHOUSE, her husband,
Complainants-Respondents,

and

BERWYN ESTATES, a corpora-
tion,

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Defendant-Appellant.

*On Appeal
from the
Court of
Chancery.*

*Answer to
Petition on
Appeal.*

The answer of the above named respondents to the petition on appeal of the above named appellant, respectfully shows:

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These respondents not acknowledging all or any of the matters, which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless say and admit that a final decree was on the twenty-sixth day of March, nineteen hundred and twenty-nine, made and entered in the Court of Chancery of New Jersey, in the cause for that purpose mentioned in said petition, as is therein stated; but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced, and these respondents are advised and believe, that the said decree is agreeable to equity

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Answer to Petition of Appeal—Eckhouse Case.

and they pray that the same may be affirmed with costs, to be adjudged to these respondents.

Dated, May 7, 1929.

LIONEL P. KRISTELLER,
Solicitor for and of Counsel
with Respondents. 10

Service of a copy of the within answer is hereby acknowledged this 7th day of May, 1929.

MARDER and OKIN,
Solicitors for and of Counsel with
Appellant.

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Petition of Appeal—Mendel Case.

PETITION OF APPEAL.

Filed May 8, 1929.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

Between

ISAAC G. MENDEL and FLOR-
ENCE MENDEL,
Complainants-Respondents,

and

BERWYN ESTATES, a corpora-
tion,
Defendant-Appellant.

*On Appeal
from the
Court of
Chancery.*

*Petition of
Appeal.*

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To the Honorable The Court of Errors and Ap-
peals in the Last Resort in All Causes:

The petition of Berwyn Estates, the appellant
in the above entitled cause, respectfully shows
that:

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1. Petitioner, finds itself aggrieved by a final
decree made in the Court of Chancery by his
Honor Edwin Robert Walker, Chancellor of the
State of New Jersey, bearing date the 26th day
of March, 1929 in a certain cause in said Court of
Chancery wherein said Isaac G. Mendel and Flor-
ence Mendel were complainants and the said
Berwyn Estates, a corporation, was defendant, in
this respect, to wit: That said decree adjudges,
amongst other things, that the agreement be-
tween complainants and defendant, dated June
27, 1928, be in all things specifically performed
by said defendant and further adjudges that in

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Petition of Appeal—Mendel Case.

the event title is not closed pursuant to the provisions of said decree, and defendant fail and neglect to pay the moneys mentioned in said decree, the said moneys together with interest are impressed as a lien upon the lands and premises in question in favor of the said complainants to the end that said lands and premises may be sold pursuant to law and that in case a deficiency should arise at such sale the defendant may be ordered to pay same and further adjudges that a counsel fee of \$500.00 be allowed to the solicitor of the complainants and that execution issue for complainant's taxed costs. 10

Petitioner appeals from the decree of the Chancellor which decrees as aforesaid upon the ground that same is erroneous in that: (a) It adjudges the complainants entitled to the relief prayed for when it should have denied the relief prayed for in the bill of complaint and dismissed the bill; (b) the contract in question should not have been and should not be specifically enforced for the reasons that (1) the Board of Adjustment denied a permit for an apartment house, (2) time for the procuring of the permit from the Board of Adjustment was not of the essence, (3) defendant sought a permit from the Board of Adjustment as promptly as possible, (4) the contract is inequitable, harsh and oppressive and the enforcement thereof does not do substantial justice, (5) the contract in question is indefinite, (6) the contract is incomplete, (7) the contract is void, (8) enforcement of the contract has unintended harsh consequences, (9) enforcement of the contract has greatly oppressive consequences, (10) the enforcement of the contract works a forfeiture, (11) the premises in question are subject to restrictions and set-back provisions different and more onerous than the restrictions stated 20
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Petition of Appeal—Mendel Case.

in the contract, (12) there is doubt in the restrictions, (13) title to the premises in question is not marketable, (14) title to the premises in question is defective, (15) title to the premises in question is doubtful, (16) the premises in question are subject to encroachments, (17) it is likely that the defendant will be exposed to litigation, (18) the complainants failed to prove that they have a good and marketable title, (19) the complainants failed to prove that the premises in question are not subject to restrictions and set-back provisions different and more onerous than the restrictions stated in the contract, (20) complainants failed to prove that title is good beyond a reasonable doubt and will not expose the defendant to litigation, (21) complainants failed to prove that defendant obtained the permit for the apartment house upon which the contract was contingent, (22) complainants failed to prove or show any facts as would entitle them to specific performance despite the fact that defendant could not obtain the permit for an apartment house; (c) the court below at final hearing refused to hear and consider evidence in connection with the defects and doubts in title, etc. and restrictions and set-back provisions different and more onerous than the restrictions provided for in the contract; (d) no counsel fee should have been allowed, and the one allowed as excessive; (e) the suit in the court below was prematurely instituted.

Petitioner therefore prays that said decree of the said Chancellor may be wholly reversed and set aside and for nothing holden and that the

Petition of Appeal—Mendel Case.

petitioner may have such relief in the premises as to this court may seem proper.

MARDER & OKIN,
Solicitors of Appellant.

AARON MARDER,
Of Counsel with Appellant. 10

Service of a copy of the within petition of appeal is hereby acknowledged this 7th day of May, 1929.

(Signed) DAVID M. LITWIN,
Sol'r of Complainants-Respondents.

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Answer to Petition of Appeal—Mendel Case.

ANSWER TO PETITION OF APPEAL.

Filed May 16, 1929.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

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Between

ISAAC G. MENDEL and FLOR-
ENCE MENDEL,
Complainants-Respondents,

and

BERWYN ESTATES, a corpora-
tion,
Defendant-Appellant.

*On Appeal
from the
Court of
Chancery.*

*Answer to
Petition of
Appeal.*

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The answer of the above named respondents to the petition of appeal of the above named appellant:

These respondents not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto nevertheless say and admit:

30

1. That a decree was on the 26th day of March, 1929, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced.

And these respondents are advised and believe that the said decree is agreeable to equity and

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Answer to Petition of Appeal—Mendel Case.

they pray that the same may be affirmed with costs to be adjudged of these respondents.

DAVID M. LITWIN,
Solicitor and of Counsel with
Complainants-Respondents.

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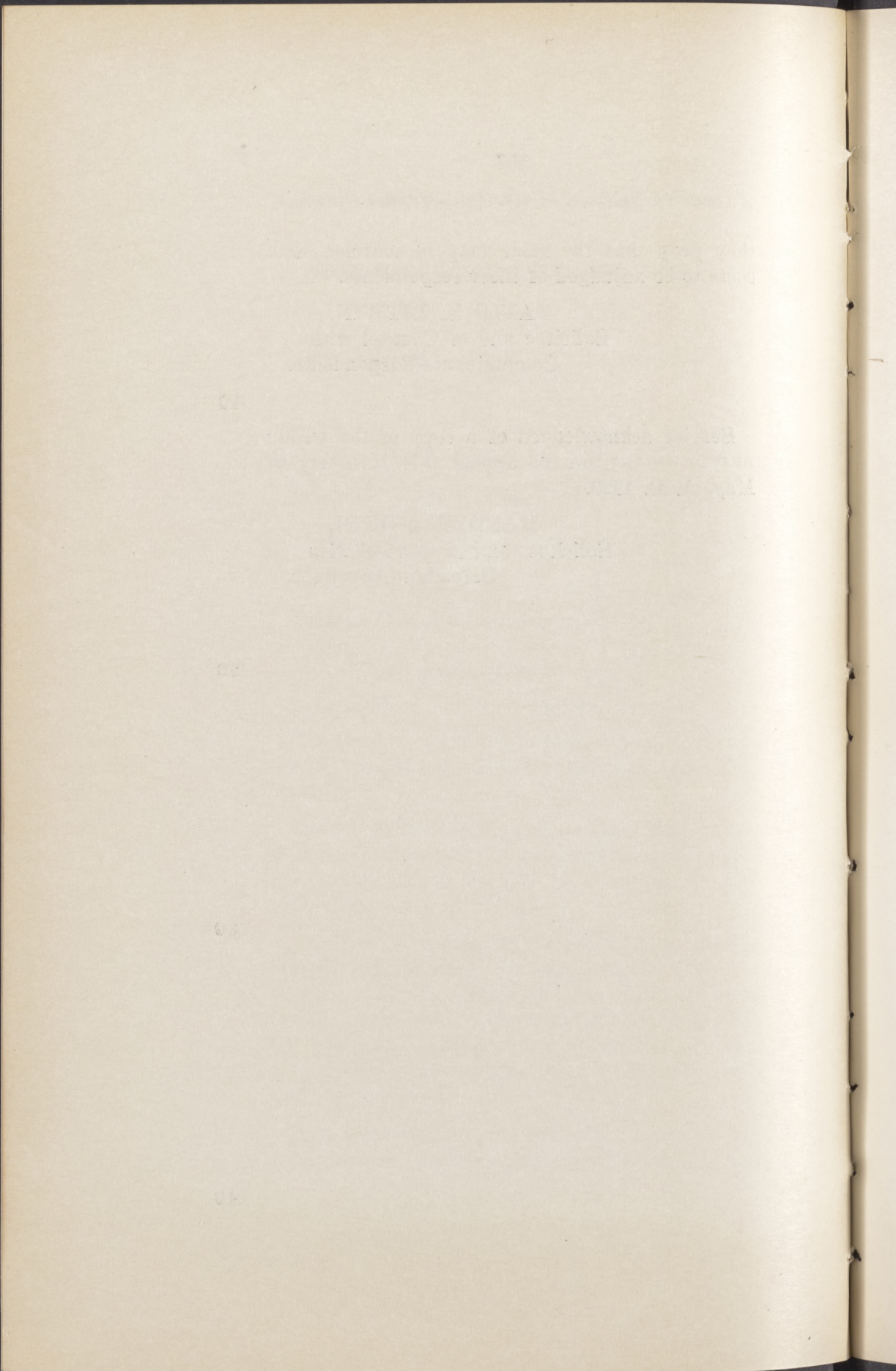
Service acknowledged of a copy of the within answer to petition of appeal this 15th day of May, A. D. 1929.

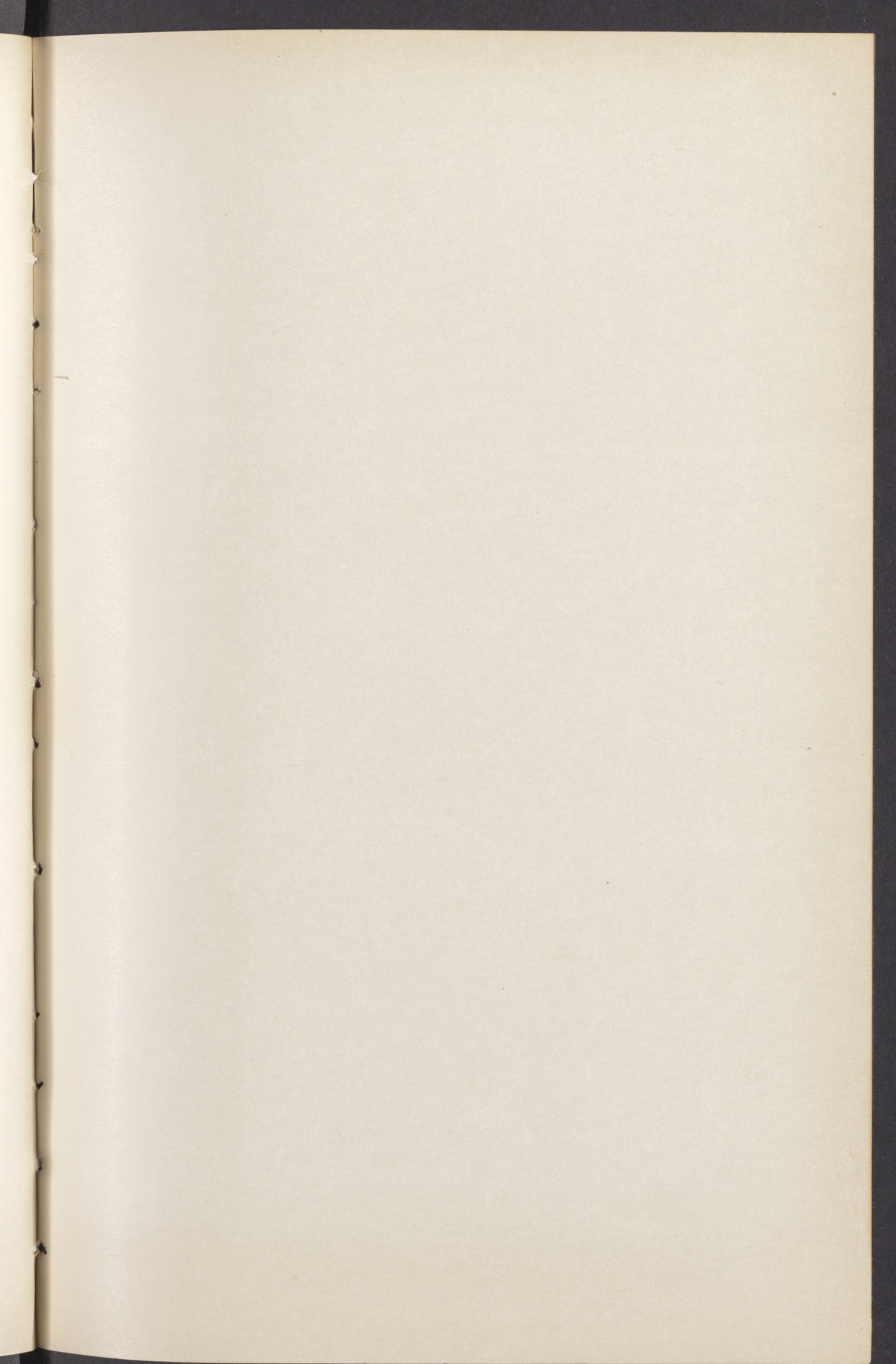
MARDER & OKIN,
Solicitors and of Counsel with
Defendant-Appellant.

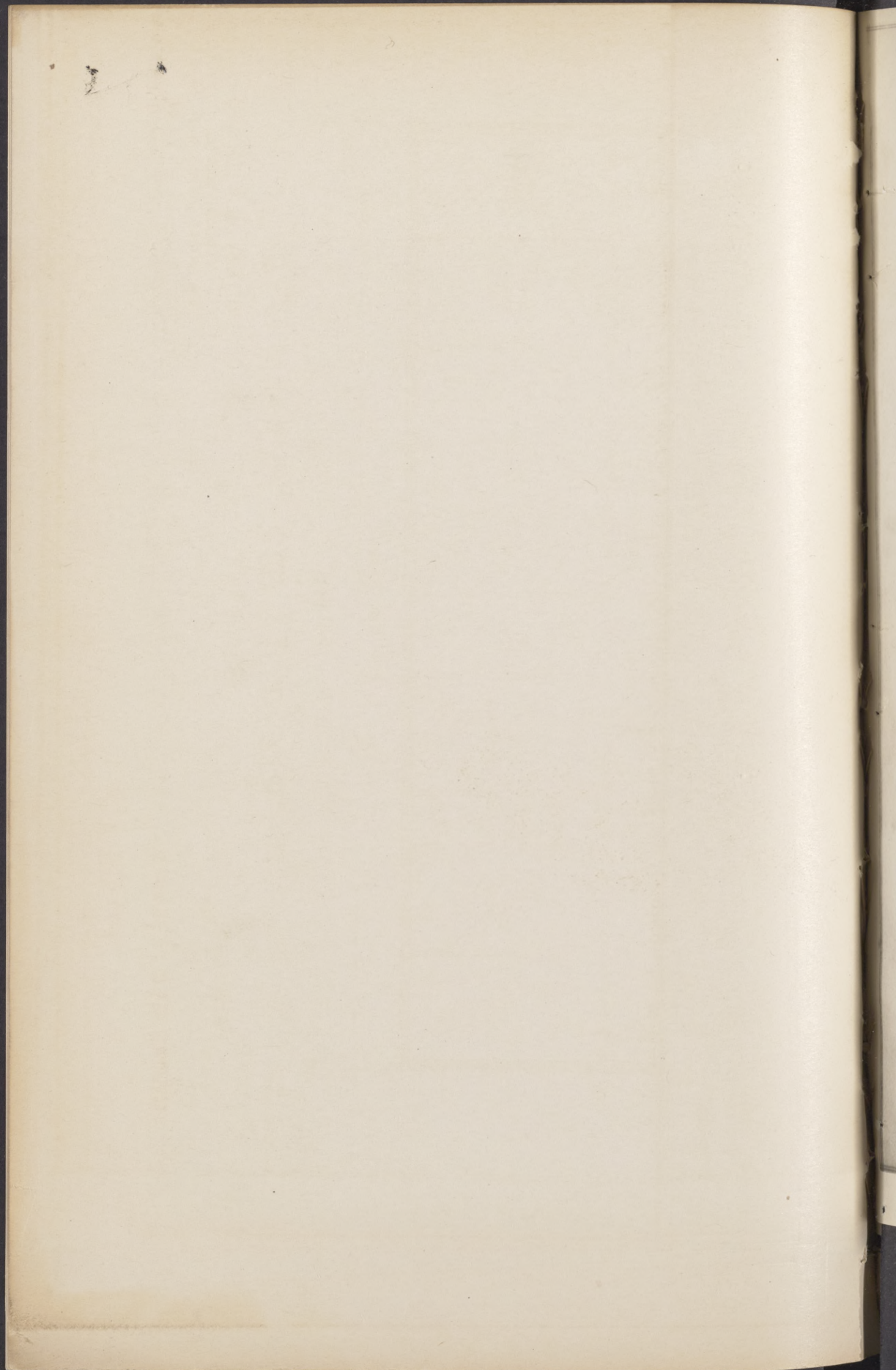
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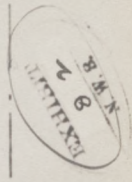
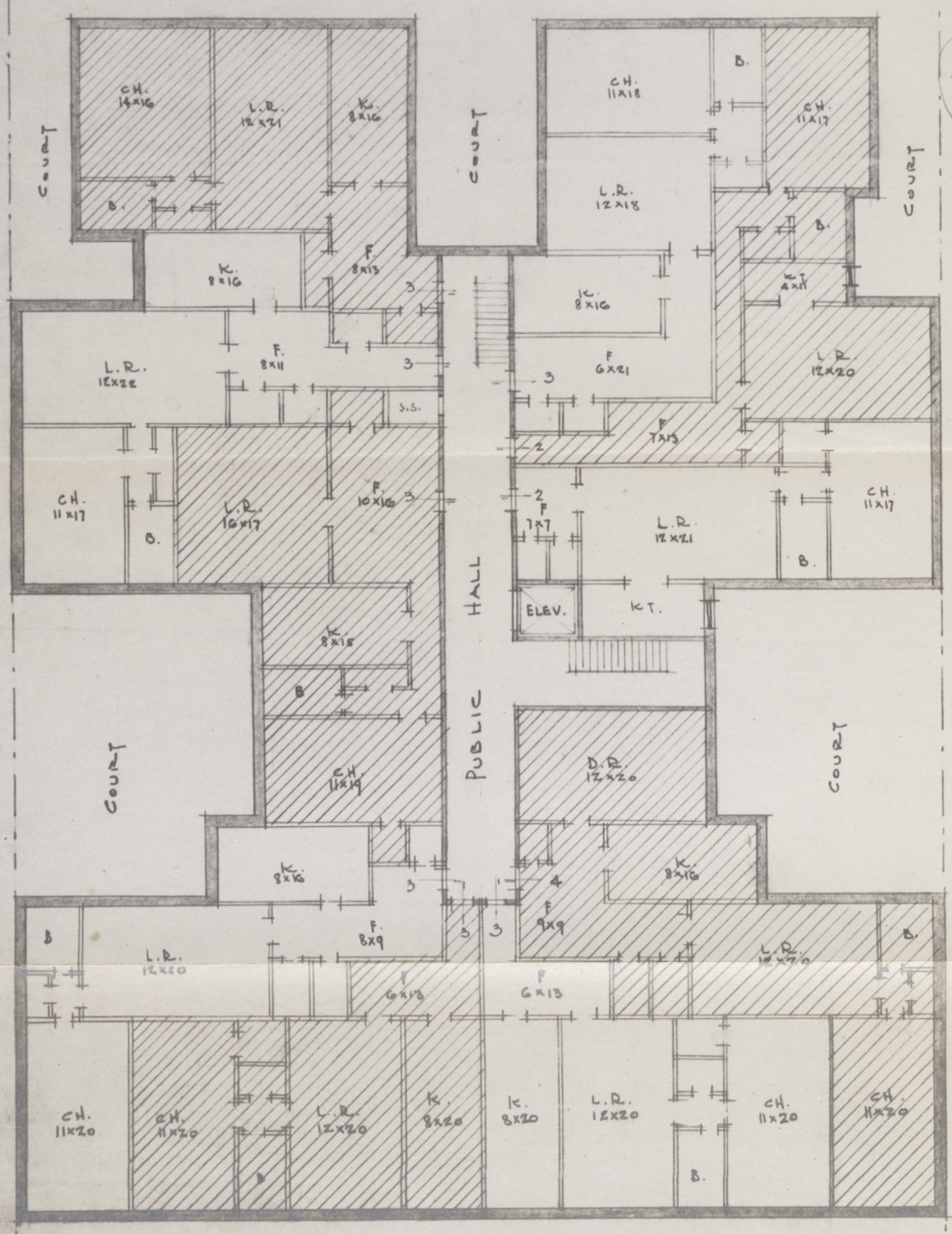






150' Lot

YARD



TYPICAL FLOOR PLAN

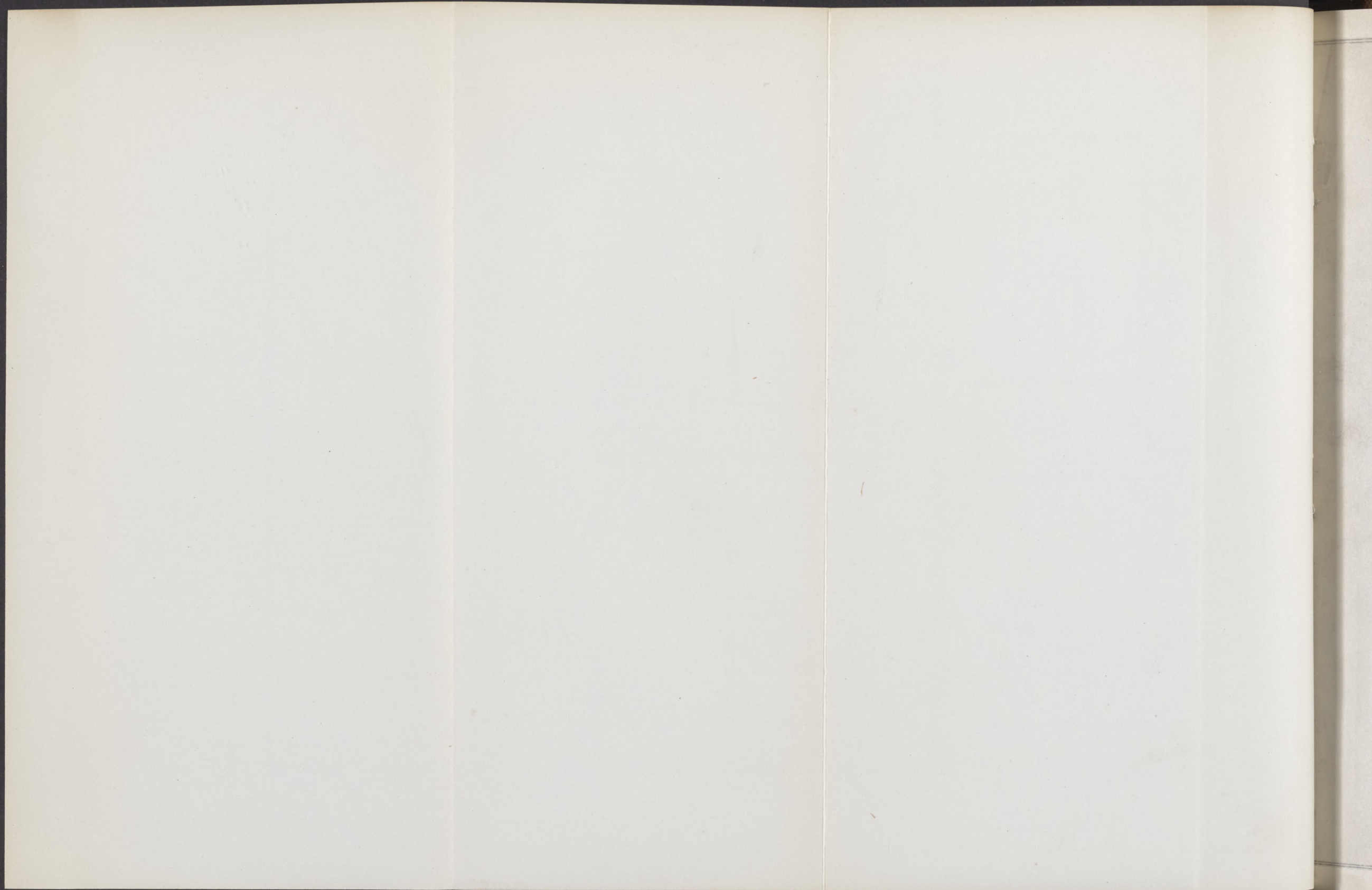
SCALE 1/8" = 1'-0"

SCHEDULE

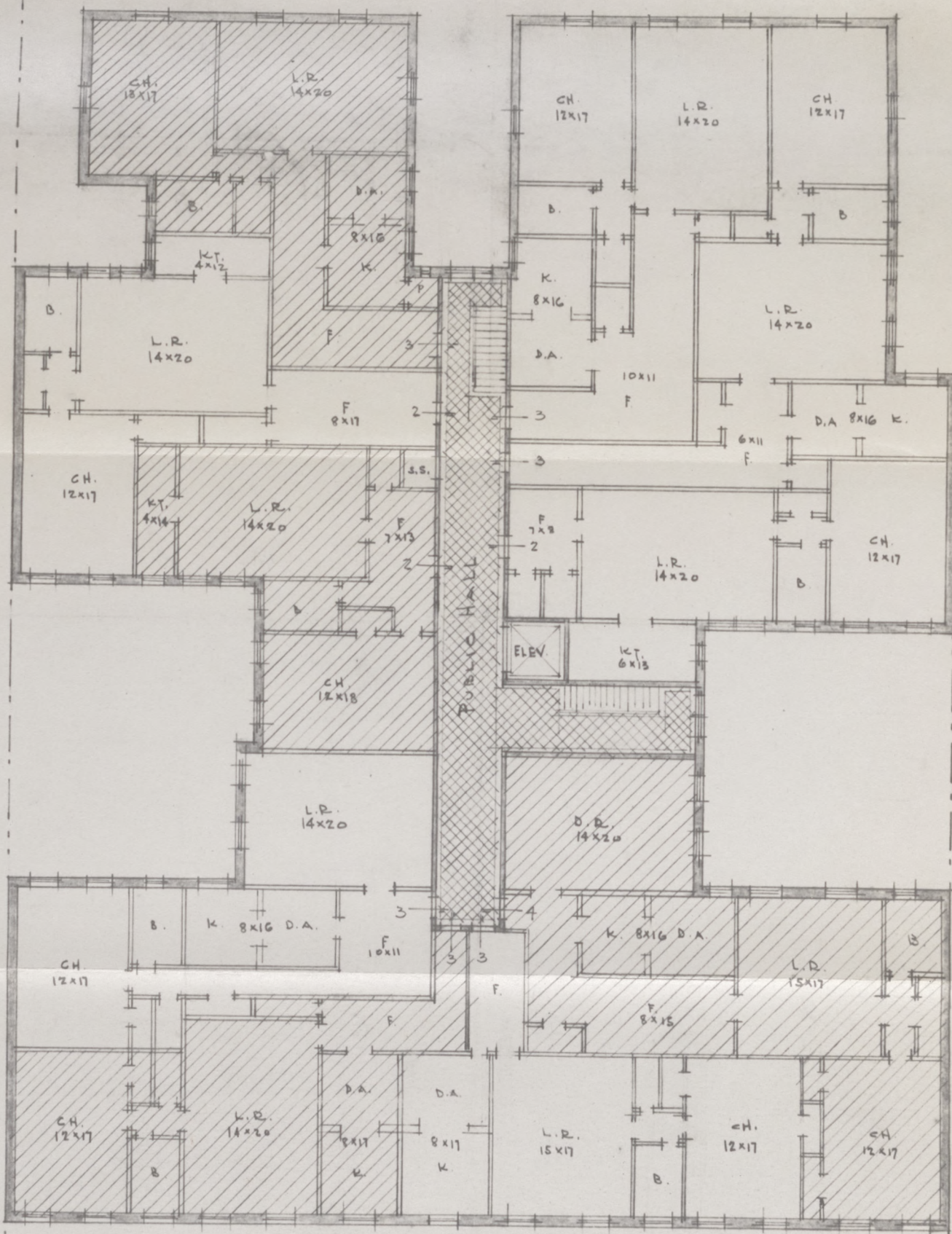
1-4 ROOM APT.	= 4 ROOMS
7-3 "	" = 21
2-2 "	" = 4
TOTAL 10 APTS. 29 ROOMS	

1st sketch

LILLEN & LILLEN
 ARCHITECTS
 155 WEST 72ND ST. N.Y.C.
 ENDICOTT 4942



YARD



150'-0" Lot

5'-0" SET BACK

100'-0" Lot

TYPICAL FLOOR PLAN

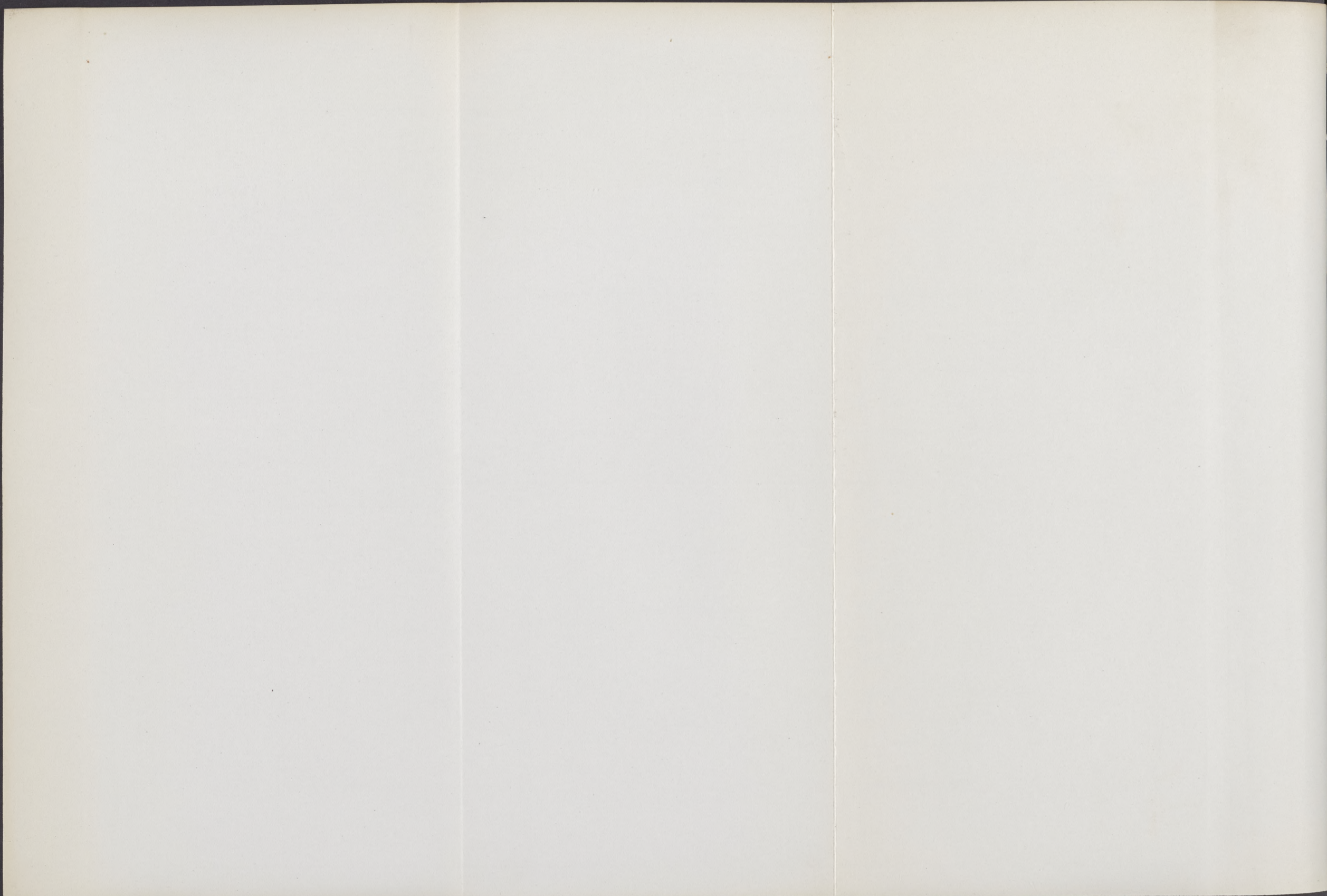
SCALE 1/8" = 1'-0"

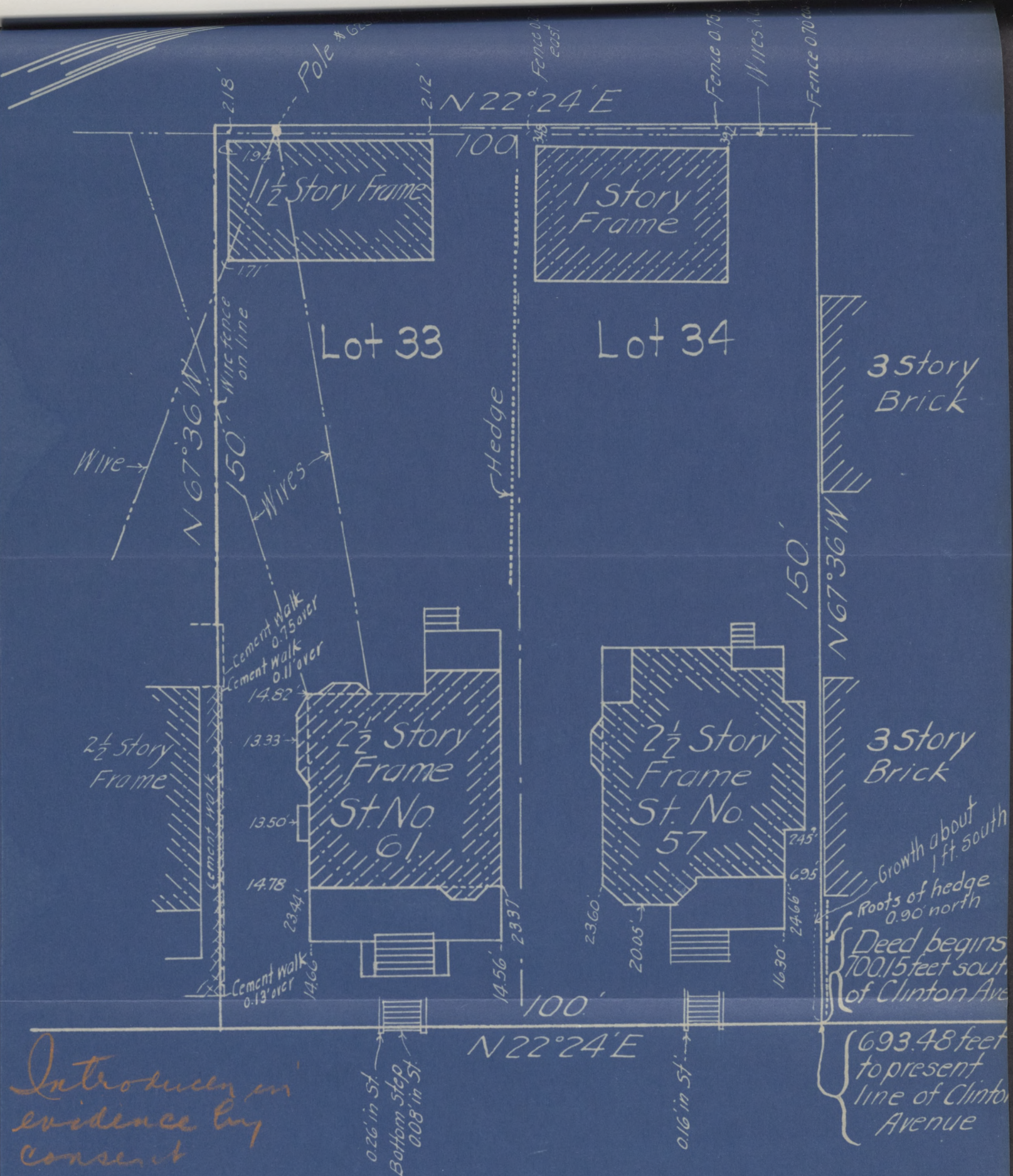
SCHEDULE

1-4 ROOM APT. = 4 ROOMS
 2-3 " " = 18 "
 3-2 " " = 6 "
 TOTAL 10 APTS. 28 ROOMS

FINAL SKETCH

LILLEN & LILLEN
 ARCHITECTS
 155 WEST 72ND ST. N.Y.C.
 ENDICOTT 4942



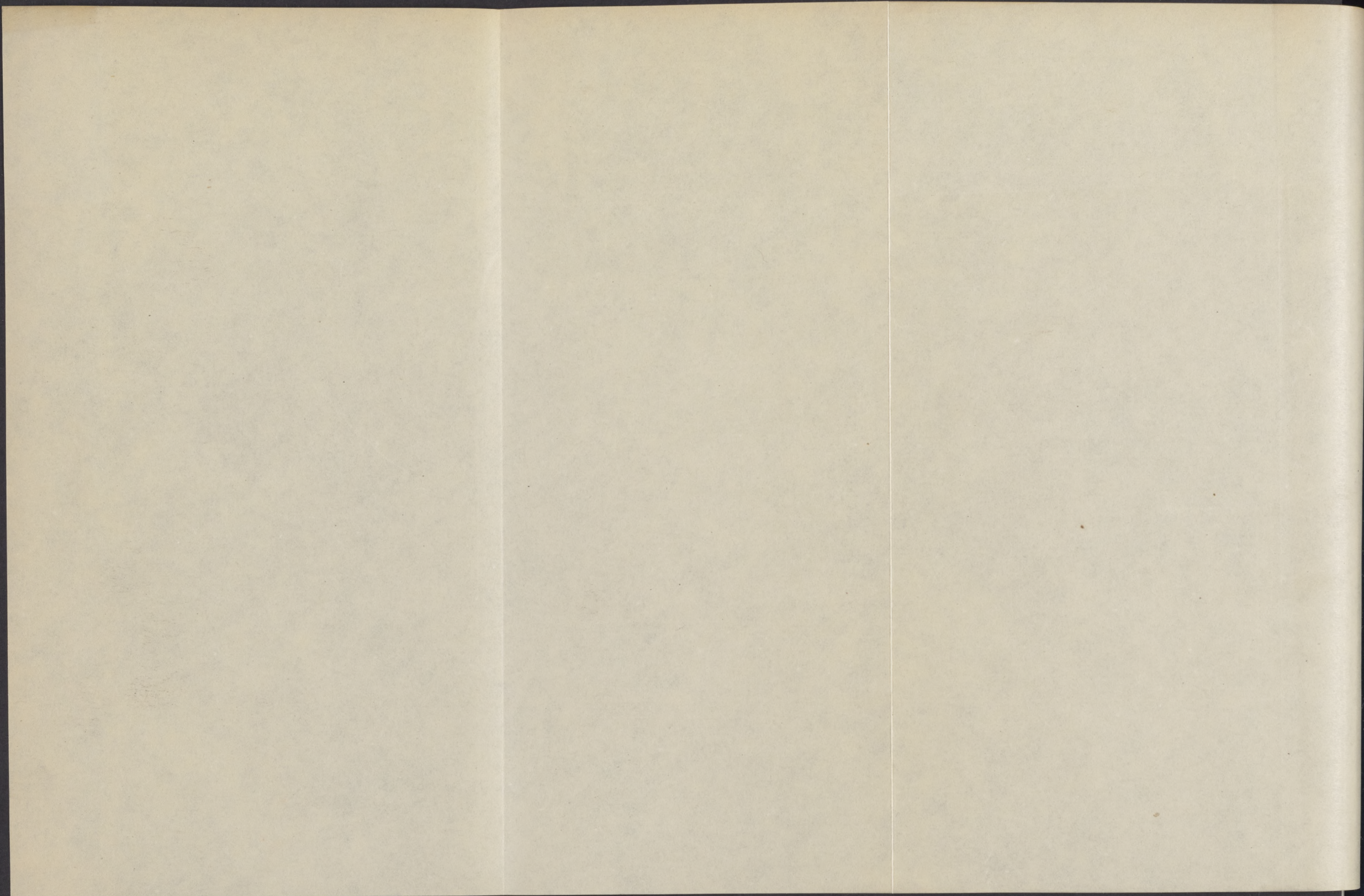


Introduced in evidence by consent

OSBORNE

TERRACE

*This survey is made upon a requisition of Aaron Marder, Esq
 Newark, N.J., March 16, 1929
 Marshall A. Bonghton
 Surveyor*





17-21

21 Osborne Terrace
Exhibit d. 2 for identification
N. W. B.



5.7-61

57-11 Osborne Terrace

Sheet d 12 A for identification

N. Y. B.

97-
the



430-36 Osborne Terrace
Exhibit d 12 to for identification
N. N. B.

30-36



49-53-53

49-53-55 Osborne Terrace
Exhibit d. 2 C for identification
J. M. B.



33-37

33-37 Osborne Terrace
Exhibits D 12 & for Identification
W. W. B.



73-77

73-77 Osborne Terrace

Exhibit of 12 C. for identification
N. H. B.



65-69 Osborne Terrace
Exhibit d 12 for identification
N. N. B.



86-90 O above Tenace
Exhibits D 12 of food Identification
N. W. B.

90



81-85 Osborne Terrace

Exhibits for identification

n.w. B.

98-18



20-26

#22-26 Osborne Terrace
Exhibit d12 & for identification
M. N. B.



38-42 Osborne Terrace
hibit d. & J for identification
N. N. B.

37
h



4-45. George Terrace
hibit a 12 for identification
D. N. B.

15
47

1-4-11
hill



54-58

54-58 Osborne Terrace
Shibet d 12 K for identification
Z. N. B.

54
the



72-7 4 Osborne Terrace
sketch d 12 & for identification
H. M. B.

Fl
1/11



78-82

78-82 Osborn Terrace
Exhibit #d 12 M. for identification
Z. N. B.

18-10
White



6266 Osborn Terrace
Exhibit 12 N for identification
N. N. B.

167
Ch



25-29 Osborne Terrace
Exhibit d 12 O for identification
N. N. B.



48-52 Osborne Senace
Exhibit D 12 p for Identification
n.w.B.

F
1
2

SE

STREET



N 22° 24' E. 1204.05

47.26 G.D. DECKER SAME REST. EXCEPT MIN. 2500.	50 REST. EXCEPT MIN. 2500.	CONK SAME REST. EXCEPT MIN. 2500.	HOTCHKISS SAME REST. EXCEPT MIN. 2500.	DECKER SAME REST. EXCEPT MIN. 2500.	SLEEP SAME REST. EXCEPT MIN. 2500.	MARLEY SAME REST.	BENNETT SAME REST.	CLEAVER PR.	UNDERWOOD P.Q.	WATT SAME RESTRICTIONS	WATT SAME REST.	DILLY SAME REST.	BRITTON SAME REST.	VAN NESS SAME REST.	JORALEMON SAME REST.	SHEPARD SAME REST.	LAWRENCE SAME REST.	50 HOWELL SAME REST. EXCEPT MIN. 2500.	56.64 KIRCH SAME REST. EXCEPT MIN. 2500.	48.17 VAN NESS SAME AS 48	150.15 46	
25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47
SHOYER	CONK APPLEBAUM	BAKER	DOLL	MENTZ	LABOW	SHRINK	ECKHAUS	UNDERWOOD	* KENSLOE	ERLICH	SMITZ	SPATH	HAYES	KINGLAND	SHEPARD	LAWRENCE	RATAN	KIRCH	KIRCH	KIRCH	KIRCH	KIRCH
57.27	50																					

OSBORNE

TERRACE

N 22° 24' E

58.61 NAVATIER SAME REST. EXCEPT MIN. 2500. DWELLING	50 BAKER SAME RESTRICTIONS EXCEPT MIN. 2500.	DOUGLASS SAME REST. EXCEPT MIN. 2500.	HEATH SAME REST. EXCEPT MIN. 2500.	WALZ SAME REST. EXCEPT MIN. 2500.	HORN SAME REST. EXCEPT MIN. 2500.	LEWIS SAME REST.	HADLEY SAME REST.	PIERSON SAME REST.	SCHWABE SAME REST. EXCEPT MIN. 2500.	BLISS SAME REST. EXCEPT MIN. 2500.	MARY L. SANFORD SAME RESTRICTIONS	EGGERS SAME RESTRICTIONS	COOK SAME RESTRICTIONS	50 SALVAGE									
24	23	22	21	20	19	18	17	16	15	14	13	12	11	10	9	8	7	6	5	4	3	2	1
DIXON	DIXON	RUSSELL	DIXON	LONG	WEBBER	SOMERS	SUTTON	SMILLER	SATE	SPENCE	DECKER	DEDRICH	SCHWABE	STORCH	LANNETT	ATELL	LONG	LONG	NE MASHIP	SALVAGE	SALVAGE	SALVAGE	SALVAGE
66.29	50																						

SEVENTH

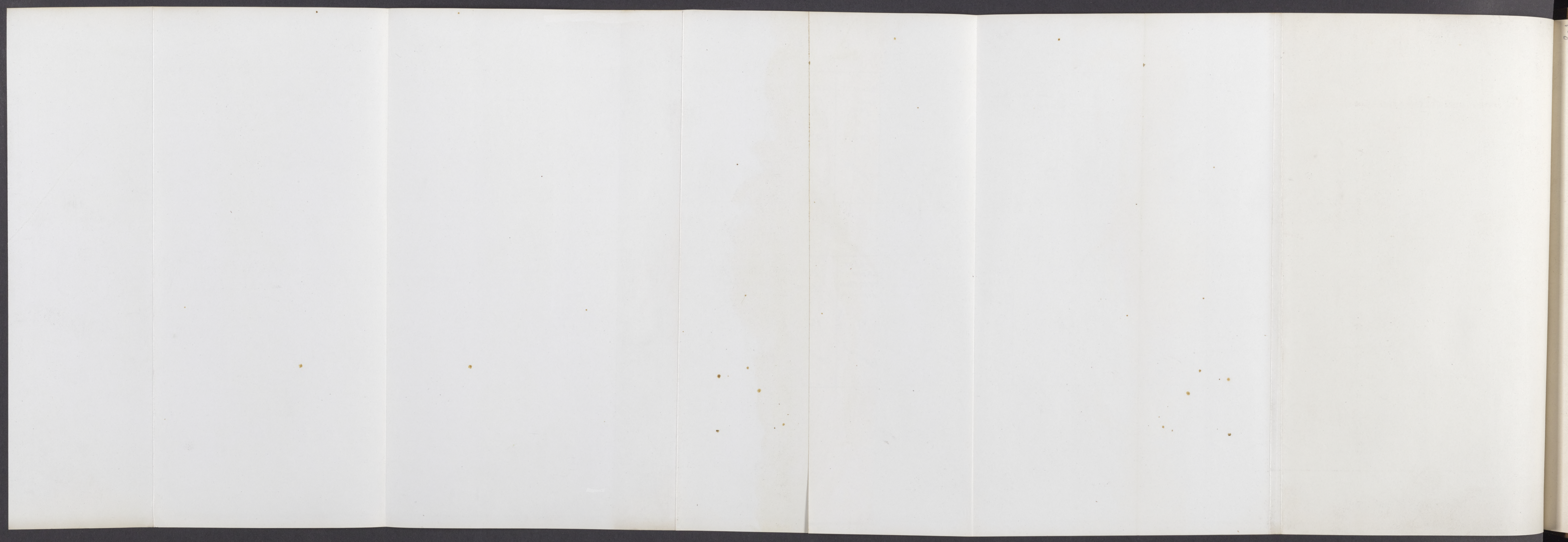
AVENUE.

RUNYON

CLINTON

Exhibit D-13 for identification
N. H. B.

MAP
OF PROPERTY BELONGING TO
JAMES H. & ROBERT A. OSBORNE.
SITUATED IN THE
TOWNSHIP OF CLINTON
ESSEX CO.
N.J.



33+34

New Jersey Court of Errors and Appeals

Between
LILLIE ECKHOUSE and ELMER
ECKHOUSE, her husband,
Complainants-Respondents,
and
BERWYN ESTATES, a corporation,
Defendant-Appellant.

On Bill, &c.
On Appeal
from the
Court of
Chancery.

Between
ISAAC G. MENDEL and FLORENCE
MENDEL,
Complainants-Respondents,
and
BERWYN ESTATES, a corporation,
Defendant-Appellant.

On Bill, &c.
On Appeal
from the
Court of
Chancery.

BRIEF ON BEHALF OF APPELLANT.

These are two appeals from two final decrees in the Court of Chancery in suits for specific performance of real estate contracts. The causes involve common questions of fact and law and were tried together. The decrees were in favor of the complainants-vendors and decree the specific performance of the contracts in question.

Statement of Facts.

The parcels of real estate involved in these suits are adjoining pieces of property. The Eckhouse

property is known as Nos. 61-63 Osborne Terrace, Newark, New Jersey and the Mendel property is known as Nos. 57-59 Osborne Terrace, Newark, New Jersey.

The Mendel agreement (pp. 61-67), which is dated June 27, 1928, provides for a purchase price of \$20,000. and stipulates (amongst other things) as follows:

“Said premises shall be conveyed subject to the two mortgages hereinafter mentioned; to restrictions of record, if any, which do not prohibit however, the erection of the apartment house hereinafter mentioned, and the provisions of the Building Zone Ordinances of the City of Newark, N. J. to the extent that they are valid, the parties hereto however, not admitting their validity, said Zoning Ordinances being subject, however, to the terms and conditions hereinafter mentioned.” (p. 62)

“It is further understood and agreed that the party of the second part has entered into a contract this day with Lillie Eckhouse and her husband, for the purchase of the adjoining premises. Should the said Lillie Eckhouse and her husband, fail to convey the said premises, in accordance with the terms of their written agreement with the party of the second part, thru no fault of the party of the second part, then and in that event, the party of the second part shall not be obliged to consummate the within contract, and in that event, the within agreement shall be null and void, and the party of the first part shall return to the party of the second part the deposit hereinabove mentioned, anything herein contained to the contrary notwithstanding.” (p. 63)

“It is understood and agreed by and between the parties hereto that the party of the second part will apply to the Zoning

Board or any other board having jurisdiction in the City of Newark, N. J. for permission to erect an apartment house of not more than five stories and basement in height, upon the within premises and adjoining premises on the south, and it is understood and agreed that if the said application is vigorously prosecuted, and if a permit for the erection of said apartment house is denied on or before September 1, 1928 and the party of the second part shall give written notice to the parties of the first part of the refusal to grant said permit on or before September 2, 1928, the within contract shall be null and void and of no effect, and the deposit of \$500.00 paid upon the signing hereof shall be returned to the party of the second part in full satisfaction of any and all damages, if any, that the party of the second part may be entitled to, and upon the return of the aforesaid deposit, neither of the parties hereto shall have any further rights hereunder, in any other event however, said contract is to remain in full force and effect." (p. 66).

The Eckhouse contract (pp. 69-75), which is dated June 26, 1928, also provides for a purchase price of \$20,000.00 and contains the following provisions which are similar to those in the Mendel contract:

"This conveyance is also to be made subject to restrictions of record, if any, which do not prohibit however, the erection of the apartment house hereinafter mentioned.

It is further understood and agreed that the party of the second part has entered into a contract this day with Isaac G. Mendel and his wife, for the purchase of the adjoining premises. Should the said Isaac G. Mendel and his wife fail to convey the said premises, in accordance with the terms of

their written agreement with the party of the second part, thru no fault of the party of the second part, then and in that event the party of the second part shall not be obliged to consummate the within contract, and in that event, the within agreement shall be null and void, and the party of the first part shall return to the party of the second part the deposit hereinafter mentioned, anything herein contained to the contrary notwithstanding." (p. 70)

"It is understood and agreed by the parties hereto that the party of the second part will apply to the Zoning Board or such other board having jurisdiction in the City of Newark, for permission to erect an apartment house of five stories upon the within premises and adjoining premises, and it is understood and agreed that if said application is vigorously prosecuted, that if the permit is denied on or before September 1st, 1928, the within contract shall be null and void, and of no effect, and the deposit herein given shall be returned to the party of the second part. In any other event, however, the said contract is to remain in full force and effect." (p. 72)

At the hearing both original copies of the Eckhouse agreements were introduced in evidence; that of the respondents Eckhouse, Exhibit C-1, did not contain the words "five story" in the paragraph dealing with the application for a permit. It is submitted that these two words were inadvertently left out. They unquestionably appear in the Mendel contract and the two agreements were so closely tied up that what was intended for one was unquestionably intended for the other.

Both contracts provided for closing on October 1, 1928.

It will be noticed that, although the house on the

MENDEL

~~Eckhouse~~ property was damaged by fire and the rights to the insurance moneys therefor (despite the sale of the premises) were retained by the vendors (p. 62, ll. 28 to 38), nevertheless the consideration for the ~~Eckhouse~~ property is exactly the same as that in the ~~Mendel~~ property, to wit—\$20,000.00.

It is unquestionable that the defendant-appellant contracted to purchase these premises for the sole purpose of erecting thereon or causing to be erected on both of said premises one five story apartment house building; and that the vendors knew this purpose when the contracts were entered into.

There is no substantial dispute as to what transpired after the execution and delivery of the contracts,

About the 29th or 30th of June, 1928 the appellant consulted an architect named Herbert Lilien for the purpose of drawing plans for the contemplated apartment house on the premises in question, (pp. 26-27) and Mr. Lilien prepared two sketches. The first sketch which was prepared was disapproved by the appellant through its president, Mr. Isaacs, and the second sketch was approved by the appellant through Mr. Isaacs. The first sketch took about two to three days to prepare and the second was prepared about four or five days after the first one. The difference in the two sketches being that in the first there were 29 rooms provided for on a floor and in the second 28 rooms provided for on a floor (p. 28). Thereupon Mr. Lilien proceeded with the plans which took about three weeks to draft and the plans were ready about the first of August, 1928. On August 1, 1928, Lilien took the plans in question to the Tenement House Department; on August 22, 1928 Mr. Le Roy of the Tenement House Department told him that the plans, approved, would be ready

the next day (p. 33, ll. 1-10); and he secured the approval of said plans from the Tenement House Department on August 23rd, 1928 (p. 29). Immediately Lilien took the approved plans to the Building Department of Newark and filed application for approval with the Building Department; he knew that the plans did not comply with the Zoning Ordinance and asked Mr. Fiverson of the Building Department to reject the plans so that no time would be lost and he could appeal to the Board of Adjustment. The appeal was proceeded with and the first meeting of the Board was on September 6th, 1928, the appeal being on behalf of the Towne Holding Company (it was conceded by counsel that the application of the Towne Holding Company was made on behalf of the appellant Berwyn Estates (p. 42, ll. 10 to 17)

At the first hearing before the Zoning Board on September 6, 1928 fifteen objectors were present and a postponement was made.

Mr. Lilien testified further that the Building Code of the City of Newark (p. 31) did not allow building on more than seventy per cent. of the lot; that the building according to the plans was 128 feet long, leaving 22 feet for both front set-back and yard; that the minimum yard depth allowed by the Building Department of the City of Newark was 10 feet, and he provided for a 10 foot front set-back and left a 12 foot yard; and that it is not customary for the Building Department of the City of Newark to act upon apartment permits before the Tenement Board has acted upon them.

On cross-examination Lilien further testified (p. 34) that neither the Building Department nor Board of Adjustment would act upon the plans for an apartment house until the plans were first passed upon and had the approval of the State Tenement Board.

The minutes of the proceedings before the Board of Adjustment show as follows: (pp. 37-38).

At the meeting of the Board of Adjustment of September 6, 1928 the matter was layed over upon request because the application came just before the holiday, which was Labor Day, and many of the residents had not had time to go into the matter. There were many objectors present and the matter was layed over for two weeks.

On September 20, 1928, the matter was again layed over.

On October 4, 1928 there were four objectors present and the application was denied.

Mr. Russel B. Rankin, Secretary of the Board of Adjustment testified (p. 38) that the Board of Adjustment did not hold any hearings in August, 1928.

The vendors, or at least one of them, Eckhouse, was present at the second and third meetings of the Board of Adjustment. (p. 59, ll. 10-20.)

The architect, Mr. Lilien, recalled by the court, testified that he did not know of the August vacation of the Board of Adjustment; that the plans were prepared as speedily as possible, (pp. 42-43).

The abstract of the title to the premises in question is introduced by the defendant through the witness Abraham Welanko, lawyer in the City of Newark. This abstract sets up defects in title and also restrictions contrary to the provisions of the contract. The defects in title, restrictions, etc., will be discussed at a later point.

William Fiverson, witness for the complainants testified on direct (p. 55) that he is connected with the Building Department of the City of Newark and it was not necessary that the plans be approved by the Tenement Board before being submitted to the Building Department of the City of Newark;

however, upon cross-examination he testified that plans are not approved by the Building Department until they bear the approval of the Tenement House Board and that there is a regulation of the Building Department not to approve plans until first approved by the Tenement Board and that such regulation is generally known by architects.

The provisions in the Mendel contract provide for notice in the event no permit had been obtained by September 2, 1928. The defendant, in order to protect itself, gave notices introduced in evidence as Exhibits C-2 (p. 60) and C-4 (p. 68) as soon as possible. It will be remembered that September 2, 1928, fell on a Sunday and that September 3, 1928 was Labor Day. The notices were in the language of the contracts.

On September 4, 1928 Eckhouse received his notice (p. 2, ll. 10-15). Mr. Mendel first saw his notice on September 5, 1928, (p. 22, ll. 10 to 12).

It was admitted by counsel that Mr. Isaacs, President of the appellant, would testify that he told Lilien, the architect, that he wanted the plans in question prepared as soon as possible because a permit had to be obtained, etc. (p. 59, ll. 25-30).

POINT I.

Specific performance should have been denied because enforcement of the contracts involves a forfeiture, has harsh and oppressive consequences as far as the Appellant^s ~~are~~ concerned, and is a distinct and undue hardship upon the Appellant.

In *Crane v. Decamp*, 21 Eq. 414, part of the opinion by Mr. Justice Scudder, on page 418 reads as follows:

“This is an application addressed to the sound, legal discretion of the court. *There is no rule in equity more clearly established, 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 the complainant he will be left to his remedy at law.* *Seymour v. Delancy*, 3 Cow. 445; *Stoutenburgh v. Tompkins*, 1 Stockt. 332; *Fry on Spec. Perf.* 106; *Talbot v. Ford*, 13 Sim. 173.

In judging of the fairness of a contract, the court will look not merely at the terms of the agreement itself, but at the relations of the parties and all the surrounding circumstances. Fry on Spec. Perf. §239.”
(Italics ours)

In *Worth v. Watts*, 76 Eq. 299, the opinion for this court by Mr. Justice Parker points out the distinction between denial of specific performance on the ground of unfairness and the greater burden of attacking the instrument, citing *Crane v. Decamp*, supra; the following is from Justice Parker's opinion, (on page 304):

“In 1831 Chancellor Vroom said, in *Rodman v. Zilley*, 1 N. J. Eq. (Saxt.) 320, 324: ‘Courts of equity seldom interfere to set aside sales and contracts on the ground of inadequacy of price. They leave the parties to their legal remedies. But when they are called on for extraordinary aid to enforce a contract, they take the liberty to examine into the consideration to be given, its fairness and equality, and all the circumstances connected with it. And if anything manifestly inequitable appears in that part of the transaction, they will never lend their power to carry the contract into execution.’”

It was held in the *Worth* case, reversing the Court of Chancery, that there should be no specific performance because of the circumstances of the case.

In *Sullivan v. Jennings*, 44 Eq. 11, the head note reads as follows:

“Although a bidder at a sheriff’s sale under a foreclosure may, by his own wilfulness, have put himself in a position where the court would not, on his application, relieve him from the consequences of his bid, yet the court will refuse to compel the specific performance of such a bid, where its enforcement must be unjust to the bidder and unconscionably advantageous to the mortgagee.”

In *Bartley v. Lindabury*, 89 Eq. 8, the bill was by the vendor to enforce a contract for the purchase of stock; the defendant, a farmer, had not provided for a loan before he made the contract. Following the contract in question there was a fire loss which impaired the value of the stock. The defendant contended that the agreement was nothing but an option. Held that in form it was

a contract binding on both sides. Held further that there was no proof of fraudulent representation. The opinion by Vice Chancellor Stevens reads partly as follows on pages 10 to 11:

“I come now to the only defense which seems to me to possess any merit, and that is that the court ought not to enforce the equitable remedy of specific performance because it would be harsh and oppressive. With considerable hesitation, I have adopted this view.

In his work on Equity Jurisprudence, volume 3 (1st ed.) in the foot-note on page 449, Pomeroy says:

‘Oppression or hardship may result from unconscionable provisions of the contract itself, or it may result from the situation of the parties, unconnected with the terms of the contract or with the circumstance of its negotiation and execution—that is from external facts or events or circumstances which control or affect the situation of the defendant.’

To the same effect is *Crane v. DeCamp*, 21 N. J. Eq. 414.

Looking, first, at the external circumstances, it appears that defendant—a farmer—was unfamiliar with business methods. Had he been otherwise, he would have applied for a loan *before* signing the contract. It also appears that the fire loss must have considerably diminished the value of the stock. While a vendee ordinarily takes the risk of depreciation, it is still true that the defendant is here placed in a position of peculiar hardship. He agreed to give for the stock, not only \$5,900 in cash, but also his farm—his only means of livelihood. The result of decreeing performance would probably be this: He would be deprived of his farm, and would be decreed to pay \$5,900 in

money. Failing to pay, the stock decreed to be transferred would be subject to levy and sale. In its depreciated condition it is more than likely that there would be but little demand for it, and that, bidders failing, complainant would buy it in and so become the owner of both farm and stock.

Looking at the agreement itself, it is not entirely clear what is meant by the stipulation 'party of the first part agrees to sell to party of the second part \$9,900 of the stock held by him in the corporation.' Does it call for stock whose par value is \$9,900, or does it call for as many shares as would, taken at their market value, make up that amount? The agreement calls for a 'guaranteed' deed. Does it mean a deed containing covenants of seizin, quiet enjoyment and warranty, or does it mean a deed for land, title to which is guaranteed by a title or trust company? Complainant's bill prays for a warranty deed. These obscurities might not, of themselves, prevent specific performance, but there is another provision which seems to me to be oppressive, particularly in view of what has happened. That provision is 'that in the event that the farm is sold for more than \$4,000, the party of the second part (defendant) is to receive one-half of the increased price over and above the commission paid for selling.' The agreement, drawn by complainant himself, does not compel him to sell. He may retain indefinitely. The undisputed evidence is that the farm is worth \$7,000. For this, and the cash payment of \$5,900, the defendant is to receive stock, *whose market value did not exceed, and may not have equalled \$9,900, at the time of the making of the agreement, and which is now, unquestionably, worth less. The clause in question was not the subject of discussion and is plainly one-sided.*

The law is well settled that courts of equi-

ty will often refuse to enforce the specific performance of an agreement that they would not, on the evidence, set aside. *Woollam v. Hearn*, 2 Lead. Cas. 695 (3d Am. ed.); *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332; *Bowker v. Cunningham*, 78 N. J. Eq. 458." (Italics ours.)

Specific performance was denied.

In *Pomeroy's Equity Jurisprudence*, 4, page 3332, Second Edition, the following is stated, citing cases:

"The contract and the situation of the parties must be such that the remedy of specific performance will not be harsh or oppressive."

On the same page in *Pomeroy* the following note appears, citing cases from many jurisdictions:

" * * * *It necessarily follows that a LESS STRONG CASE is sufficient to defeat a suit for a specific performance than is requisite to obtain the remedy: See Vigers v. Pike, 8 Clark & F. 562, 645, per Lord Cottenham.*" (Italics ours, except that in the original "less strong case" and "defeat" are also italicized).

In *Blake v. Flatley*, 44 Eq. 228 the decree for the specific performance for the purchase of a lot of small value was reversed by this Court on the theory of the exercise of sound discretion. The opinion by Mr. Justice Scudder reading partly as follows on pages 231 and 232:

"It is a serious objection to the exercise of the extraordinary jurisdiction of the court in this case that there is not an allegation in the bill of complaint, nor a single fact in the evidence, to show that the complainant would be in a worse position if he should

bring his action at law to recover damages for a breach of this agreement, nor a reason given for burdening the defendants with large bills of costs in such a small matter. An action for damages, where the amount that can be reasonably claimed is so little, must, by statute, be brought in an inferior court of law, where the costs are much less than in the higher courts of law or equity.

To permit the complainant to evade this statutory limitation of costs, by bringing his action in a higher court, and claiming a remedy there which does not appear to be in any way more beneficial to him, would be contrary to the policy of the law, and unjust in its result. If this decree is affirmed the defendant will lose the whole purchase price of his land in costs, and the complainant be in no better position than if he had pursued his less expensive remedy at law. The case is without precedent in the small value of the land in controversy, and the absence of any special cause for its prosecution in a court of equity. These objections conjoined are sufficient to influence this court to deny the relief which the complainant has sought in his bill for specific performance.

The decree will be reversed, the bill dismissed, and costs allowed to the defendants."

In *Denne v. Light*, 8 De G. M. & G. 774, 3 Jur. N. S. 627, 26 L. J. Ch. 459, 5 Wkly. Rep. 430, 57 Eq. Eng. Ch. 598, 44 Eng. Reprint 588, the contract was for the purchase of arable land. The vendor was denied specific performance because there was no proof of access or right of way. The contract was carefully prepared in the usual English way. The following is from the opinion by Lord Justice Knight-Bruce:

"He deals; and in the summer of 1855 (after some ineffectual struggles to obtain

easier terms) brings himself to offer as much as £100—an offer, unluckily for him—unluckily for the plaintiff—accepted—whereupon the purchaser, calling in a solicitor at Kingston to encounter the Kentish solicitors of the seller, there followed the costly ceremonial attendant—I will not say generally, let me rather say not very unusually—upon English purchases of land; a contract formally prepared and signed, then an abstract of title transmitted and perused, then objections, queries and requisitions—answers and replies, correspondence, embroilment, and a suit in Chancery.”

The contract said nothing about a right of way and on this point the opinion reads as follows:

“It was well argued for the Plaintiff, that to refuse to undertake the description or designation of any line or course was, in effect, for all present purposes, the same as refusing to undertake for there being any right of way: a proposition, however, to which I am unable to accede, especially in a suit for specific performance, where the vendor is Plaintiff, and the contract, a written contract, is silent on the subject, a silence much to be regretted. Perhaps, however, had either side required that silence be departed from there would have been no contract.”

In *Migel v. Bachofen*, 96 Eq. 608, this Court reversed the decree for specific performance. It appeared that the manifest purpose sought by the complainant through the litigation was not the enjoyment by it of the defendant's patented appliance but the prevention of the use of it by any competitor in business with the result that the defendant would be deprived of revenues by way of royalties either from the complainant or other people. The

opinion by Chief Justice Gummere concludes as follows, pp. 611-612:

"A court of equity ought not to lend its aid in the carrying into execution a scheme so manifestly unfair to the defendant, and for this reason a decree of specific performance should have been denied. The remedy by specific performance is discretionary; the question is not what must the court do, but what, in view of all the circumstances of the case in judgment, should it do to further justice, and, where the enforcement of the contract will be attended with great hardship or manifest injustice to the defendant, the court should always refuse its aid. Plummer v. Keppler, 26 N. J. Eq. 481, and cases cited: Blake v. Flatley, 44 N. J. Eq. 231.

For the reason indicated, the decree appealed from will be reversed." (Italics ours.)

In the case at bar, as above pointed out, the appellant unquestionably contracted to purchase the premises in question for the sole purpose of erecting thereon a large five story apartment house building, and the vendors knew this. The premises were zoned against the contemplated building. The parties knew that application had to be made for change of zone. The contracts were prepared by vendors' counsel (Exhibit C-3, p. 68, shows that the Mendel agreement was prepared in the office of David M. Litwin, Esq., solicitor of the Mendels. Exhibit D-1 shows that the Eckhouses acknowledged same (p. 75) before Saul J. Zucker, Esq., an associate of Lionel P. Kristeller, Esq., solicitor of the Eckhouses. The plans were prepared and presented as expeditiously as possible. The Board of Adjustment had no meetings in August, 1928. Notice had to be given of the application to

the Board of Adjustment to neighboring property owners. The Board of Adjustment did not act upon the application until after September 1, 1928; the first meeting was on September 6, 1928, the second on September 20, 1928 and the final meeting when the application was rejected, was on October 4, 1928. There were numerous objectors present.

Clearly it is unfair and inequitable; and an undue hardship to compel the appellant to go through with the contracts for purchase when it cannot use the premises for the contemplated five story apartment house building, especially when the sole purpose of the purchase was known to the complainants. It is common knowledge that land used for ordinary residential purposes is worth but a small fraction of that used for apartment house purposes.

The Court below makes the point that because the notices of rescission were served soon after September 1, 1928, that entitled the complainants to immediately institute suits for specific performance; the suits were immediately instituted and before the application had been acted upon by the Board of Adjustment. The notices were given because of the harsh language of the agreements and the uncertainty of the construction of the agreements; it will be noticed that the notices were in the *language* of the contracts; moreover the building departments had denied a permit when the notices were given; the appellant did not intend a rescission until the application had been acted upon by the Board of Adjustment; it felt that it had to give these notices to protect itself in the event the application was finally rejected by the Board of Adjustment. It will be noticed that one of the com-

plainants was present at the Board of Adjustment meetings (p. 59, ll. 10-20); clearly indicating that that complainant did not feel that the notices amounted to a rescision since at said meetings both he and appellant's representative were present.

It will also be noticed that the contracts nowhere state what is to happen in the event that the application is not acted upon by September 1st. In the language of the *Denne* case, *supra*, it is quite probable that if that subject were discussed there would have been no contract.

The case at bar, so far as the Board of Adjustment was concerned, came within sub-division 4 of section 9, Chapter 274 of P. L. 1928, (1928 Zoning Act), which sub-division is found on page 702. It will be noticed that even if the Board of Adjustment had granted the application for the five story apartment house building, such action would nevertheless be subject to approval or disapproval by the Board of Commissioners of the City of Newark. Section 9 of said act deals with the powers of the Board of Adjustment and sub-division 4 reads as follows:

“To recommend in writing to the governing board or board of public works, upon appeal in specific cases, that a structure or use be allowed in a district restricted against such structure or use where the lands in respect of which such recommendation is made do not abut a district in which such structure or use is authorized by the zoning ordinance or where such lands are more than one hundred and fifty (150) feet beyond the boundary line of the district in which such structure or use is allowed by the zoning ordinance. Whereupon, the governing body or board of public works may, by resolution, approve or disapprove such recommendation;

and in case such recommendation shall be approved by the governing body or board of public works, then the administrative officer in charge of granting permits shall forthwith issue a permit for such structure or use."

The circumstances above pointed out, as well as the defects in title, restrictions and uncertain language of the contracts, make it inequitable and an undue hardship upon the appellant to compel it to take title to the premises in question.

POINT II.

The time for the obtaining of the permit was not of the essence; the contracts were incomplete or uncertain; a permit was denied.

Clearly the complainants, not intending to build, were not damaged by a failure to obtain a permit on or before September 1, 1928.

Moreover, even after the institution of suits, both parties waited for action by the Board of Adjustment on the application.

In *Orange Society v. Konski*, 94 Eq. 632, affirmed by this Court per curiam, 95 Eq. 254, the contract provided that if the plans for the building were neither approved or rejected by the 10th of October, then the purchaser might cancel or, etc. The purchaser's plans were not submitted for approval until about the 25th of October. The opinion by Vice Chancellor Backes, reads partly as follows on page 635:

"I said during the course of the argument that time was of the essence of the contract.

That statement was too broad. I should have said that the assent of the engineer and the mayor was, at all events, a condition precedent to performance and that it was Konski's privilege to withdraw from the contract if his building plans were not accepted by the 10th of October. It was his right to do so arbitrarily, but he did not, and it is quite evident from what transpired that neither party regarded performance on that date imperative." (Italics ours.)

It will be noticed in the *Konski* case that the contract provided for both approval and non-approval—a complete contract.

In the case at bar, there is no provision in the event of a non-action by the specific date and it is urged, on that score, that the contract is incomplete.

Appellant urges that it must be held that either the contract is incomplete and hence specific performance cannot be granted or else provision for non-action on the permit by the Board of Adjustment by this specific date must be read into the contract, in which latter event a reasonable time can be afforded the appellant after September 1, 1928 for action by the Board of Adjustment on its application.

Authorities to the effect that an incomplete contract cannot be specifically enforced are *Carr v. Passaic Land Improvement and Building Co.*, 22 Eq. 85; *Lippincott v. Bridgewater*, 55 Eq. 208; *Schneider v. Crawford*, 99 Eq., 249, where the following appears on page 250:

“This case is governed by the cases of *Bettcher v. Knapp*, 94 N. J. Eq. 433; *Kuskin v. Guttman*, 99 N. J. Eq. 754, and *Tansey v. Suckoneck*, 98 N. J. Eq. 669. It will be noted that the alleged contract herein pro-

vides that "regular agreement of this sale to be drawn and signed by both parties here-to at any time before October 1st, 1925." From this it would clearly appear that the parties did not intend that they should be bound until the formal contract which was here termed the "regular agreement" should be executed."

Clearly, the appellant did not intend to be bound in the event of non-approval by the Board of Adjustment nor did the complainants-vendors intend the appellant to be bound in the event of such non-approval. Further, as above pointed out, the contracts should be most strongly construed against the vendors.

In *Myers v. Metzger*, 63 Eq. 779, this Court holds that uncertainty in the contract is fatal to a claim for specific performance.

In *Heller v. Sweeney*, 100 Eq. 151, the following is part of the opinion by Vice Chancellor Church on pages 152-153:

"In my opinion, the contract is too uncertain to permit of its enforcement in a court of equity. *The contract provides that if Heller is unsuccessful in his application for a permit, or in the court proceedings, his deposit will be returned to him. This language makes it uncertain as to whether the parties meant to imply an option or a contract of sale.*" (Italics ours.)

In *Turkington v. Zuber*, 100 Eq. 285, the opinion by Mr. Justice Trenchard, on pages 287-288, reads partly as follows:

"Specific performance will not be decreed unless the existence and essential terms of the contract be clearly proved. It must be shown that a contract has been concluded.

If it be reasonably doubtful whether the contract was finally closed, equity will not interfere by decreeing a specific performance. *Nor will it interfere when the evidence leaves the agreement as to any of its essential terms in uncertainty.* *Brown v. Brown*, 33 N. J. Eq. 650; *McKibbin v. Brown*, 14 N. J. Eq. 13; affirmed 15 N. J. Eq. 498. (Italics ours.)

It is respectfully submitted that this agreement must either be held to be incomplete in not providing for non-action by the Board of Adjustment on or before September 1st, 1928; or must be held to be uncertain as to meaning because of the failure to provide for such non-action; or must be construed to provide that if no action be taken on or before September 1st, 1928 the contracts are void at the option of the appellant; or must be construed to provide for additional reasonable time from September 1st for action on the permit by the Board of Adjustment. In any of such events, it is submitted, specific performance should have been denied.

Further, the Building Department of the City of Newark denied the permit *before* September 1, 1928; the language in both contracts is broad enough to allow the construction that such denial of the permit was sufficient to give to the appellant the right to rescind.

POINT III.**The Appellant can urge question of hardship on this appeal.**

The learned Court below in its conclusions (p. 125, ll. 25-35) states that no suggestion of hardship was made at the trial.

At the hearing, appellant's counsel (p. 23, ll. 9-13) stated:

“We contracted to buy these premises for the purpose of putting up an apartment house. The contract contained, if construed one way, rather hard provisions.”

The entire case makes manifest the extreme hardship upon the appellant if compelled to buy the premises without being able to erect thereon the contemplated five story apartment house building.

It is respectfully submitted that the learned Court below erred in making the statement aforesaid and that the question of hardship was presented in the court below.

This court will remember the application made to it to supplement the transcript of proceedings by showing that the appellant's counsel at the hearing in the court below desired to submit a brief on all points in the case, but that, nevertheless, the court below decided the case immediately at the conclusion of the hearing.

This question of hardship is presented in the petitions of appeal (pp. 146 to 149 and pp. 152-155).

It is submitted that even if the question of hardship were not presented to the court below it never-

theless may be urged in this court, for the reason that an appeal in equity is a trial *de novo*.

In *Pennington v. Todd*, 47 Eq. 569, the opinion by Mr. Justice Dixon, reads partly as follows on page 570:

“It is a settled rule in this court that an appeal from a final decree in chancery brings up for review the whole case, with all interlocutory orders involving the merits of the controversy. *Crane v. DeCamp*, 7 C. E. Gr. 614; *Decker v. Ruckman*, 1 Stew. Eq. 614; *Clair v. Terhune*, 8 Stew. Eq. 336.”

The following is from Volume 4 of *Corpus Juris*, page 726, citing cases ^{FROM} ~~in~~ various jurisdictions:

“(2) In Equitable Proceedings: (a) In General. Under the old chancery practice and usually under the codes of procedure, suits in equity are tried *de novo* on appeal upon the entire record and evidence. *The appellate court itself will sift the whole evidence and determine what the finding of the trial court should have been upon such evidence as was competent and proper. The court below and the appellate court are judges of both law and fact.* It has been said that “the adoption of the codes scarcely made an impression upon equity causes, so far as their trial in the lower or appellate courts was concerned’”. (Italics ours)

In *Penrose v. Absecon Land Company*, 94 Eq. 436, this Court held that even though a point of jurisdiction were not specifically presented in the petition of appeal, but was covered thereby, this Court would consider the point.

POINT IV.

The burden is on complainants-vendors to prove good title; the defendant-vendee can raise questions of title for the first time at the final hearing.

In *Cornell and Douglass v. Andrus*, 36 Eq. 321 (E & A) affirming 35 Eq. 7, it was held that on a bill for specific performance of an agreement for the purchase and sale of land, where the defendant's refusal to perform is based on alleged defects in complainant's title, full statement and proof of the title will be required.

The opinion by Mr. Justice Scudder, on page 323 reads partly as follows:

"In order that the judgment of this court may have the influence which it ought to have, and would doubtless have in quieting this title, if a specific performance should be decreed, it is essential that the complainants should make full proof of their title, and especially of the proceedings for foreclosure of the mortgage and sale under which they claim. A decree here should be based on such proof, and not on the admissions of counsel, which may not be satisfactory to others."

The following is from 36 Cyc. 695:

"Burden of Proof as to Title: The burden of proof is on the vendor to show a good title, where that is denied in the vendee's answer, or the vendee in his answer insists that the vendor exhibit his title, or the vendee refuses to perform on account of alleged defects."

citing cases from various jurisdictions, including *Cornell and Douglass v. Andrus*, supra.

The following is in 36 Cyc. 782:

“Vendor’s Title. By the rule in some jurisdictions, in order to entitle the vendee to an exhibition of the vendor’s title, he must allege either an entire want of title, or point out the particular defects of which he complains. *But by the original chancery practice* the objection need not be stated in the answer, or taken until the hearing before the master, on reference to settle the terms of the conveyance.” (Italics ours).

citing *Park v. Johnson*, 7 Allen (Mass.) 378, in which case the objection to title was stated for the first time at the hearing before the Master.

In *VanRiper v. Wickersham, E. & A.*, 77 Eq. 232, the defendant vendee rejected title because of delay and did not in the answer deny tender of good title and thereby lulled complainant into feeling of security as to title, held that the complainant was properly given additional and reasonable time to perfect title and that the practice in this state is to have title adjudicated at final hearing; held also that reasonable time to perfect title will be afforded to vendor only if that could be done *without hardship* to the vendee. The opinion by Mr. Justice Voorhees, on page 239 reads partly as follows:

“The English rule seems to be that laid down in *Langford v. Pitt*, 2 P. Wms. 630, by Sir Joseph Jekyll, M. R., that it is sufficient if the party entering into articles to sell has a good title at the time of the decree. The cases are collected under *Seton v. Slade*, 2 White & T. Lead. Cas. (4th Am. ed.) 529. It has been said that the courts

have never directed performance by the vendee if the title at the time of the decree was still defective. The English rule, however, holds that if the master's report on title is that the vendor, upon getting in a term or getting administration, &c., will have a title, the court will put him under terms to procure that speedily. *Coffin v. Cooper*, 14 Ves. 205. In a note to *Cooper v. Denne*, 1 Ves. 567, it is said that the rule has been productive of great hardship, and Lord Eldon, who decided *Coffin v. Cooper*, declared that he would never extend it to any case to which it has not been previously applied.

The difference, however, between the practice of the English courts and that of our own, makes it illogical to apply their rules with exactness to all cases arising in our courts. They have the matter of title first referred to a master to report upon and then comes the decree. They hold that perfection of the title by the time of the decree, that is, after its adjudication by the master, is sufficient. *Now with us the title is not adjudicated until the final hearing, upon which a decree may be entered and signed immediately.* Thus we see that the English rule is even more lenient than ours, for it allows the necessary time intervening between the master's determination of the title and the time of the entry of the final decree." (Italics ours).

In *Doutney v. Lambie*, 78 Eq. 277, this Court held that as soon as a question of fact arose as to the exact location of Park Avenue, New York, specific performance was properly denied. The opinion by Mr. Justice Parker, reads partly as follows on page 279:

"In Fry Spec. Perf., §253, et seq., the rule is laid down that the vendor must prove that his title is good beyond a reasonable doubt,

and will not expose the defendant to litigation." (Italics ours).

In the cases at bar, the defendant's answers set up that the title to the premises was defective and unmarketable in various ways and subject to restrictions, etc. and that the suits were prematurely filed. (pp. 6 and 17).

The learned Court below does not treat of questions of title anywhere in its conclusions (pp. 121-125). At the hearing the learned Court below held (p. 22) that not only was the burden of proving the defects in title on the defendant but the burden was likewise on the defendant to show that the defects were called to the attention of the complainants prior to the date of the passing of title and were part of the reasons in refusing said title. The learned court below also refused to receive evidence of various defects in title, restrictions, etc. (pp. 46-53).

It is respectfully submitted, in the cases at bar, that the defendant did not have to know anything about title to the premises in question until final hearing, assuming that it had to know anything about title at that time. The contracts provided for passing of title on October 1, 1928. Both the Mendel and Eckhouse suits were instituted on September 7, 1928 (pp. 1 and 10).

The fact that notice had been given to complainants that the appellant had not secured a permit to erect an apartment house did not absolve the complainants from furnishing a marketable title and one free from restrictions and in accordance with the contract. Even if it be contended that the complainants were entitled to enforce the contracts, with the conditions relative to the permit eliminated, nevertheless the appellant was entitled

to good and marketable title and title in accordance with the contract. The contract contemplated that in the event the appellant was successful in procuring its permit it would still have another month in which to examine the title. Under the ruling of the Court below the appellant was deprived of this right. The true construction of the contract in view of all of the evidence in the case is that it was intended by both parties that the purchaser was to take the premises in question only in the event it could be used for the contemplated apartment house; if the properties could not be used the appellant was not to be obligated to complete the purchase; if the properties could be so used then only was the contract to be consummated; and the intention was that it was not to be necessary for the purchaser to examine the title until after the permit had been procured.

It is respectfully submitted that the decrees should have gone for the defendant because of the complainants' failure to exhibit and prove good title and title in accordance with the contracts.

It is respectfully submitted that the learned Court below erred in ruling as above stated and refusing to consider questions of title.

POINT V.

Specific performance should not be decreed where title is defective or doubtful; or where the restrictions are more onerous than those provided for in the contract; or there is doubt as to the restrictions; or the purchaser will be exposed to litigation.

Part of the opinion by Mr. Justice Trenchard for this court in *Saracino v. Kosower Construction Co.*, 6 A. R., 255, on page 258, reads as follows:

“Now, it is the uniform rule in this state to decline to decree specific performance at the suit of the vendor of real estate where a reasonable doubt concerning the title exists, though rested on grounds merely debatable, *but which might visit upon the purchaser litigation in that regard, and that, too, where at law the title might in fact be declared good. Van Riper v. Wickersham, 77 N. J. Eq. 232.*” (Italics ours).

In this case it was held that although the presumption of death of a person for seven years unheard of might make a title good at law, specific performance of such a title would not be decreed because of the doubt and possible litigation. In this case the person in question disappeared in 1874.

In *Kohltrepp v. Ram*, 79 Eq. 386, specific performance was denied because the Court of Chancery refused to pass upon a question as to the proper execution of a deed purported to be executed by an attorney-in-fact, holding that Chancery will not decide doubtful questions of law or fact, where interests of third persons might be involved, in a suit for specific performance.

The same rule is laid down in *Sharpe v. Stretch*, 98 Eq. 225. The opinion by Vice Chancellor Berry on page 229, etc. reads partly as follows:

“A mere recital of the restrictions which have been imposed upon the lot in question indicates that there is some doubt as to their meaning and also that they are different and more onerous than the restrictions stated in the contract.

It is admitted in the agreed state of facts that an acceptance of a conveyance of the lands in question will subject the defendant to litigation in the event that he attempts to erect any building on the lot. This, in itself, is sufficient to refuse specific performance, as it is quite apparent from the agreed state of facts that the parties had in mind the erection of a dwelling-house on this lot at the time the agreement was entered into. Elmora Development Co. v. Binder, 97 N. J. Eq. 126; Smith v. Reidy, 92 N. J. Eq. 586.

Equity will not compel a purchaser to specifically perform his contract of purchase where there is a doubtful question of law or fact affecting the title of the vendor. Kohlrepp v. Ram, 79 N. J. Eq. 386.

Any decree of this court making a comparative construction of the restrictive ~~state of facts that the parties had in mind~~ enants here involved would not bind the property owners on North Walnut Street who have threatened the defendant with litigation, and, therefore, it is unnecessary and improper for this court to now attempt to construe these restrictions. Franklin v. Creth, 3 N. J. Adv. R. 93; 97 N. J. Eq. 538. (Italics ours).

It seems so plain that the enforcement of this contract would be inequitable that it is unnecessary to further discuss the matter or cite further authorities. I will advise a decree dismissing the complainants' bill.”

In *Burke v. Dorfan*, 101 Eq. 84, the vendee contracted to buy the property in question so that he could use it for dyeing and *dressings furs*. There was a restriction in the record title against the tanning, *dressings* or preparing of *skins, hides and leather*. The complainant further contended that the restriction was only for the benefit of the Rutherford Park Association; that there was a change in the neighborhood, etc. Specific performance was denied. The opinion by Vice Chancellor Backes, on page 85, reads partly as follows:

“Now, all that the vendor asserts may eventually materialize, but the title cannot be vindicated of the aspersions in this suit; that can be done only in a suit against the other lot owners, or in one by them for an invasion of the covenant, and the vendee is not to be called upon to offer himself as a victim of litigation by compelling him to make the purchase, or a sacrifice, if later judicial view shall not accord with the vendor’s contention. It is the vendor’s duty to sweep the house. Where the question of the marketability of a title, sought to be imposed upon a vendee, is reasonably debatable, in a court of justice, in point of law or fact, specific performance will be denied. *Smith v. Reidy*, 92 N. J. Eq. 586.

The prayer of the bill will be denied and that of the counterclaim sustained.”

In *Smith v. Reidy*, 92 Eq. 586, the facts are partly stated as follows on page 587:

“It is this last-mentioned ‘triangular gore’ which is the lot comprised in the contract now before the court.

The covenants in question provide that neither Doolittle nor his successors in title shall cause or suffer the erection on any part of the said premises of any building except a dwelling-house (and stable or garage) of

a certain specified size and cost; that the front line of the house shall not be within thirty feet of the front line of the lot, and the foundations of the stable or garage not within one hundred feet of the front line of the lot; the shortest street line of a lot abutting more than one street was to be deemed the front line of such lot. The covenants conclude with a specific provision that 'the restrictions herein shall not apply to lots which are not at least one hundred feet deep and fifty feet wide,' except that on none of such lots shall any nuisance be carried on, nor any manufacture or sale of liquor.

The defendant has not objected to the restrictions against nuisances, or the manufacture or sale of liquor, and by her answer consents to accept title subject to those restrictions, her objection to the title being to the building restrictions."

The following is from the opinion by Vice Chancellor Buchanan, on pages 591-593:

"In my opinion, the lot in question is not subject to the building restrictions, but I find myself unable to say that that proposition is not open to any rational debate—that it is a conclusion beyond any reasonable doubt. My own view rests upon my belief that a lot one hundred feet deep and fifty feet wide means a lot one hundred feet deep throughout its breadth and fifty feet wide throughout its depth; and also upon the legal principle that restrictions placed upon the use of lands conveyed in fee are always to be construed strictly, and ambiguities and uncertainties are to be resolved in favor of the owner's unrestricted use of the land. *Marsh v. Marsh*, 90 N. J. Eq. 244; *Underwood v. Herman*, supra; *Howland v. Andrus*, supra; *Walker v. Renner*, 60 N. J. Eq. 493. But, as against my views of the construction of the language of the covenant, it is certain-

ly true that the triangular lot in question is literally over one hundred feet deep and over fifty feet wide, and I cannot say that another court or another judge might not be persuaded, by arguments developed by parties having an interest in maintaining the restrictions (no such parties being before me or involved in the present suit), to a conclusion at variance with mine. And, as to the legal principle—while it is absolutely well settled in equity suits, and while it would seem clear that, being a rule of construction, it would be equally applied at law as in equity, and while I know of no decisions or dicta to the contrary, yet, on the other hand, such search, as I have had opportunity to make, discloses no decision at law in this state where the rule has been laid down. Moreover, the language (“the above-described premises, or any part thereof”) of the covenant imposing the restrictions is certainly broad enough to include the triangle, the language relied on to take the triangle out of the restrictions being in an exception to the general prohibition, and there is another well-known rule of construction which would require it to be made clear that a thing clearly within the general prohibition, but claimed to be excepted therefrom, does, in fact, come within the meaning of the exception clause.

Finally, I cannot say that defendant would not be exposed to litigation if she took title and then built upon the lot in contravention of the provisions of the restrictive covenants. It will be noticed that the language of the Court of Errors and Appeals in the *Van Riper* and *Doutney Cases*, quoted earlier herein, is “exposed to litigation”—“not exposed to the hazards of litigation”—as is said in some of the cases. Of course, in one sense, each of us is always exposed to litigation; suit may be brought unjustifiably against any one, through ignorance or

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malice. What is meant, however, is, I take it, the possibility that a reasonable man advised by ordinarily competent counsel, might sue in respect of these covenants, in the expectation or belief that a successful outcome was not beyond the bounds of reasonable possibility. Tested by that standard, there would be no danger of suit in equity, as I have hereinbefore pointed out, but the same cannot be said as to a suit at law for damages for breach of covenant."

Specific performance was denied.

In *Brengard v. Meighan*, 100 Eq. 387, according to the dates of the instruments, the mortgage (under foreclosure of which title was made) was assigned to one, Josephine Schmid after her death. On hearing proof was given to show that this was not so; held nevertheless, that specific performance was discretionary and would be denied unless curing quit-claims were procured, the opinion reading partly as follows, on page 388:

"while the sheriff's deed made in pursuance of a judicial sale may not be open to collateral attack, still, under the circumstances, the defendant or her grantees might reasonably be confronted later on with an action in ejectment by someone claiming title under the owner of the equity of redemption, or they might be compelled to file a bill for the reformation of the assignment by Mary Zimmerman to Josephine Schmid so as to correctly state its accurate date."

In *Garber v. Stern*, 100 Eq. 470, affirmed per curiam, by this court, 101 Eq. 742, it is held that a right of way of the telephone company to maintain poles and wires on parts of the premises to be conveyed is sufficient to defeat specific performance.

In *Welitoff v Kohl*, 105 Eq. 181 (decided Oct. 14, 1929) the following is from the opinion by Judge White for this Court, on page 189:

"The restriction is a result (in equity) of the covenant but not the covenant itself, and of course, injunctive relief by enforcement of the restriction may be and frequently is denied without there being any impairment of the covenant as a vehicle for the recovery of damages for its breach. Changed conditions may make it so inequitable to enforce performance that such enforcement will inevitably be denied, but

POINT VI.

The restrictions to the title prohibit the erection of the five-story apartment house contemplated by the Appellant.

The restrictions are at least doubtful. The Appellant, if it did purchase, would be exposed to litigation because of said restrictions. The restrictions are more onerous than those provided for in the contracts.

It will be recalled that both contracts provided that the premises were to be sold subject to restrictions of record which restrictions, however, did not prevent the erection of the contemplated five story apartment house building. The restrictions in the two titles read as follows (pp. 111-112) :

“And the said party of the second part for himself, his heirs and assigns doth hereby covenant to and with the said party of the first part, their heirs, executors and administrators that neither the said party of the second part nor his heirs or assigns shall or will at any time hereafter erect upon the said premises any buildings other than *a dwelling house and its appropriate out buildings and the said dwelling house to cost in no case less than \$3,000.00 and to be situated at least twenty feet distant from the line of Osborne Terrace* and that no barn shall be erected on said premises within one hundred feet of said Osborne Terrace neither shall they erect or permit upon any part of the said premises any building to be used for the sale of intoxicating liquors or for any manufacturing business or any hog pen, public laundry, livery stable, meat or fish market

or for any purpose that would be considered detrimental, noxious or dangerous to the owners or occupants of the surrounding premises." (Italics ours).

This restriction was passed upon by this court in *Underwood v. Herman & Co.*, 82 Eq. 353, where a former owner of the Mendel property sought to enjoin the erection of a three story apartment house building on the premises adjoining on the north.

This three story apartment house building is shown on Exhibit 12 C for identification and is also shown partly on 12 A for identification immediately alongside the premises in question. In the *Herman* case, this Court, reversing the court below, held that the restriction was not so manifest and clear as to be free from doubt and consequently an injunction against the erection of the three story apartment house was reversed, upon well known equitable principles.

It should also be remembered that the *Herman* case is in no way conclusive or *res adjudicata* upon the neighboring owners of property in the Osborne Tract; that they are not in any way concluded by said suit from seeking to enforce the restrictions; that in the *Herman* case there was a contrariety of judicial opinion.

The case at bar presents an altogether different question. The question is not whether the language is so free from doubt that an injunction will issue but whether the appellant ^{be} compelled to take the risk of litigation or ~~is~~ exposed to litigation in connection with its contemplated five story apartment house building.

The restrictions and the neighborhood are described in the *Herman* case as follows, quoting from page 354:

"This restriction was contained in all the deeds of conveyance of forty-eight plots of ground, containing fifty feet frontage by one hundred and fifty feet in depth, made and executed by James H. Osborne and Robert A. Osborne to various grantees, among whom were the complainant and the defendant.

The lots were situated on Osborne Terrace, running south from Clinton Avenue, in the City of Newark, for a distance of twelve hundred feet. The complainant was among the first purchasers and erected a one-family residence upon the plot he purchased. The plots thus restricted were built upon excepting that purchased by the defendant and another purchaser of a lot near Clinton Avenue. Thirteen of the forty-seven houses built upon the plots are two-family houses, and thirty-four of the plots contain one-family houses."

The photographs, Exhibits D-12 to D12-p, inclusive, for identification, show most of the houses in the Osborne Tract. The numbers on the backs of said exhibits also indicate how near these houses are to the premises in question.

It is submitted that an apartment house of the kind indicated on Exhibit D-4 presents an altogether different question than that shown on Exhibit D12-c for identification.

It is respectfully submitted that the outcome of a litigation wherein a neighboring owner would seek to enjoin the erection of this five story apartment house is not so free from doubt, to say the least, as to allow specific performance. Moreover, in this same Osborne tract the Navatier restriction (p. 118), Exhibit D-11 for Identification, restricts to any building other than a double dwelling house. This clearly restricts against a five story apartment house building and is some indication of the intent of the restrictions in the title in ques-

tion, to wit, an intent against a five story apartment house. The Navatier restriction does not appear to have been considered in the *Herman* case.

The *Herman* case moreover indicates that the restriction was a community scheme, which the court below did not allow the appellant to prove (p. 47). It was submitted also to the Court below that the houses in the neighborhood in question are substantially of the same character excepting the three story apartment house immediately on the north. Here clearly again there is danger and likelihood of some neighboring property owner deriving title out of the Osborne tract to institute litigation against the appellant to prevent the erection of the contemplated apartment house.

Further indications of an extreme likelihood of litigation is the presence of objectors at the Board of Adjustment hearing. At the first hearing there were many objectors present and at the second and third hearings there were four objectors present.

It should also be remembered that in a suit to enjoin the appellant from erecting the contemplated five story apartment house building evidence might be introduced so as to convince the court that the restriction against the contemplated building is so free from doubt as to permit an injunction.

Moreover, there is extreme probability that if a neighboring property owner sued at law for damages occasioned by the violation of the restriction of the erection thereon of a five story apartment house, the appellant would have to pay and judgment would be recovered against the appellant both because of the violation itself and the violation of the 20 foot set-back provision. As above shown the appellant cannot erect its contemplated five story apartment house building with a twenty foot set-back provision.

POINT VII.

The Appellant is entitled to the property without any set-back restriction.

The twenty foot set-back provision in the restriction is clearly and unquestionably enforceable.

The contracts do not provide for any set-back restriction whatsoever. There is no word or intimation of set-back restrictions in the contracts.

It is respectfully submitted that because of the twenty foot set-back restriction existing in the title, specific performance should have been denied.

POINT VIII.

Title of Complainants was and is defective and doubtful and specific performance should have been denied.

There will be discussed under this point all title questions excepting those involving restrictions.

The Court below did allow in evidence an abstract of the title of the premises in question (Exhibit D-10, pp. 103-117). Title to both premises involved came out of the Osborne Tract.

(a) The Beginning point of the Mendel property, which is the most northerly of the two pieces in question, is, according to the Mendel deed (p. 116) and the Mendel contract (p. 61) 700.15 feet southerly from the southerly line of Clinton Avenue. The survey introduced in evidence by con-

sent shows that said beginning point is but 693.48 feet southerly from Clinton Avenue. There is nothing in the case explaining the difference. There is a like variation in the distance from Clinton Avenue between the beginning point of the Eckhouse piece in the description in the deed and contract, and the beginning point in the survey; so that there is resulting doubt to the extent of 6.67 feet as to both the northerly and southerly portions of both premises.

(b) Title to the Osbornes came through the bargain and sale deed of one, Henry H. Miller, alleged trustee under the will of Peter Sanford, deceased, of David P. Sanford (p. 110). Mr. Welanko, a lawyer practicing in Newark, testified that he searched the records in the Surrogate's Office in the County of Essex in connection with the Estate of Peter Sanford (pp. 49-50) to ascertain whether Henry H. Miller was appointed trustee, but he could find no such appointment but he did find that Miller was appointed administrator with the will annexed.

In *Varick v. Smith*, 67 Eq. 1, it is held that an administrator with the will annexed can exercise a power of sale as an executor but not where the power devolved on the executor as trustee with trust duties to perform. The decision in 67 Eq. was commented on by Chancellor Magie in 69 Eq. 505, on page 507, as follows:

“The matter was heretofore brought to the attention of the court, and the conclusion then reached therein is expressed in the opinion reported in 67 N. J. Eq. 1. The conclusion was that the administrator did not possess power to deal with the residuary estate, either by sale of the real estate or by division thereof under the will, and that a

trustee was necessary to carry out the testatrix's disposition of the residuum. Thereafter application was made for the appointment of a trustee."

In the *Varick* case in 67 Eq. 6, the opinion by Chancellor Magie reads partly as follows:

"But I do not find it possible to discover in the statute of 1888 any grant of power to an administrator with the will annexed to sell lands which are the subject of an express devise in trust. Had the devise in this case been made to strangers instead of to the executors, it does not admit of question that the administrator would have no power of sale under the statute."

The statute of 1888 above mentioned is Section 13 on page 2262, Vol. 2 of Compiled Statutes of 1910.

Henry H. Miller, as trustee, etc., purported to secure title by sheriff's deed (p. 109) under foreclosure of the \$11,000. mortgage given by George H. Tay and wife to Peter Sanford, recorded in book H-5 of Mortgages for Essex County, page 300, (p. 107). This mortgage, Henry H. Miller, as administrator of Peter Sanford, assigned to himself as trustee under the will of Peter Sanford, deceased, of David P. Sanford (p. 108). Under Peter Sanford's will (pp. 108-109) the testator gave to the executors \$20,000 in trust for his son, David P. Sanford, and appointed Samuel U. Bond, John N. Tuttle and Edgar E. Bond, executors, all of whom renounced. Henry H. Miller qualified as administrator C. T. A.

It is submitted first, that under the above decision, in the *Varick* case, Henry H. Miller, not having been appointed trustee could not convey the premises in question.

There is a further reason for questioning title made by Henry H. Miller's deed. Unquestionably the premises, if title were in Henry H. Miller, were charged with the trusts set out in the will. There is no proof that the *cestui quis* of that trust assented to Miller's conveyance or are estopped to question same by participating in the proceeds. Said *cestui quis* or their representatives can question said conveyance at any time.

It is respectfully submitted that it is at least doubtful as to whether Henry H. Miller conveyed good title to the lands and premises in question.

(c) Title to the entire Osborne tract is made through deed of Peter Sanford and wife to George H. Tay, recorded in book M-14 of Deeds for Essex County, page 568 (pp. 106-107). After this Tay deed is the Tay mortgage recorded in book H-5 of Mortgages for Essex County, on page 300 (p. 107) and title is purported to be made by the foreclosure of this mortgage resulting in sheriff's deed, dated January 22, 1886, and recorded in book Y-22 of deeds for Essex County, page 206 (p. 109). Said sheriff's deed shows that the defendants' in said foreclosure proceedings were Harriet A. Tay, A. N. Down, Jennie T. Tay, Harriet B. Tay and Charles F. Tay. No mention is made of George H. Tay, the mortgagor and owner of the equity of redemption. If George H. Tay died before the institution of the foreclosure suit, there is no proof as to who his heirs at law were. There is no record of death, or will or heirs-at-law or next of kin in the Essex County Surrogate's office in connection with George H. Tay (p. 108, ll. 15-25).

It is submitted that there might be outstanding interests in the premises in question not disposed of by the record title. It is submitted

further that this point is well within the facts in the *Saracino* case, *supra*.

(d) The last deed of record in the Mendel chain of title is from Alexander Luban and wife to Isaac G. Mendel and Frances R., his wife, recorded in book E-67 of Deeds for Essex County, page 300 (p. 116) and brings about an estate by the entirety in Frances R. Mendel and Isaac G. Mendel. The Mendel contract was executed by Isaac G. Mendel and Florence Mendel, his wife. There is nothing in the case explaining this. There is nothing in the case explaining what happened to Frances R. Mendel. If she was divorced, clear title cannot be made by Isaac G. Mendel and Florence Mendel.

(e) If Frances R. Mendel died there is no proof that the inheritance taxes on her property were paid. There is no inheritance tax receipt on file in the Essex County Clerk's office (p. 104). Property held by the entirety is taxable. Section 1 of the Inheritance Tax Law, Volume 2, Cumulative Supplement to Compiled Statutes, on page 3573. Section 5 of said Act, on page 3578 of said volume, provides that inheritance taxes are liens on real estate.

It is submitted that title to the Mendel property is doubtful.

POINT I X .

Specific performance is a discretionary remedy and should not be granted in these cases.

In *Degheri v. Carobine*, 6 A. R., 290, reversing 100 Eq. 493, the opinion by Judge Kays reads partly as follows, on page 294:

“We are therefore of the opinion that the court went beyond sound discretion in its decree in this case. Vice-Chancellor Van Fleet, in the case of *Ten Eyck v. Manning*, 52 N. J. Eq. 47 (at p. 49) lays down the following principle:

‘The remedy by specific performance is not a matter of strict right, but of sound judicial discretion, and will be granted or denied as the justice and right of the particular case shall seem to the court, on full consideration of the rights and equities of the parties, to require.’

As stated in this rule, specific performance at its best is a discretionary remedy and a court of chancery cannot compel a mortgagee to take that which such mortgagee does not wish to take or which it has not agreed to take for the purpose of relieving the premises in question of the operation of liens or encumbrances in order to give a vendee clear title to the land. It makes no difference in this case whether the oral agreement made by the mortgagee was good in equity or not. If such oral agreement was good and binding on the mortgagee then the mortgagee could not be compelled to take a lesser consideration for the release of its mortgage than it had agreed to take, and if the oral agreement was not binding upon the mortgagee, then the mortgagee would not have

to accept any amount less than the full amount of the mortgage covering the entire tract." (Italics ours).

It is submitted that a full consideration of the rights and equities of the parties requires a denial of specific performance and that the decrees of the court below went beyond sound discretion and should be reversed.

POINT X.

No counsel fees should have been allowed and those allowed were excessive.

The purchase price in each of the contracts is \$20,000. The causes were tried together; there was but one session; the hearing was finished in about three hours, starting at about 10 o'clock in the morning and ending about 1 P. M.

The court below allowed a counsel fee of \$500.00 to the solicitor of the complainants in the Eckhouse case (p. 133, ll. 17-22) and a like counsel fee of \$500.00 to the solicitors of the complainants in the Mendel case (p. 140, ll. 27-32).

It is respectfully submitted that these allowances, if any should be made at all, are excessive, especially in view of the circumstances of the case.

It is further respectfully submitted that in view of the hardship, etc. no counsel fees should have been allowed as against the appellant.

POINT XI.

The counterclaim in the Eckhouse case should have been sustained and the Complainants therein be decreed to return the deposit, etc. for the reasons above argued. See also, *Goldstein v. Erlick*, 96 Eq. 52.

In conclusion, it is respectfully submitted, that the decrees in the case at bar should be reversed, set aside and for nothing holden, and the court below directed to dismiss the respective bills of complaint with costs in favor of the appellant as against the respective complainants, and that the counterclaim in the Eckhouse case be sustained and allowed.

Respectfully submitted,

MARDER & OKIN,
Solicitors for Appellant.

RALPH E. LUM and AARON MARDER,
Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

Between

ISAAC G. MENDEL and FLOR-
ENCE MENDEL,

Complainants-Respondents,

and

BERWYN ESTATES, a corpora-
tion,

Defendant-Appellant.

On Bill, etc.

*On Appeal
from the
Court of
Chancery.*

BRIEF OF RESPONDENTS.

Statement.

This is an appeal from a final decree advised by the Honorable Maja Leon Berry, Vice-Chancellor, and entered in the Court of Chancery of New Jersey on March 26, 1929. The decree, amongst other things, directed the appellant to specifically perform an agreement made on June 27, 1928, by the respondents as vendors, and the appellant as vendee, for the purchase of a parcel of real estate known and designated as Nos. 57-59 Osborne Terrace, Newark, New Jersey.

Facts.

The pertinent facts in this case are substantially the same as those set forth in the brief presented by the respondent in the case of Lillie Eckhouse and Elmer Eckhouse, her husband, complainants-respondents, and Berwyn Estates, a corporation, defendant-appellant, being case No. 33 on the list of causes of this Court for the October, 1929 Term. The same questions of law

are involved and these respondents will therefore rest their argument upon the brief submitted and the oral argument presented by Lionel P. Kristeller, counsel for the respondents in the Eckhouse case, and will merely point out two matters which differ from those contained in the latter case.

The clause contained in the agreement in the case at bar, and which relates to the application and denial of the permit by the Zoning Board, reads as follows:

“It is understood and agreed by and between the parties hereto that the party of the second part will apply to the Zoning Board or any other board having jurisdiction in the City of Newark, N. J. for permission to erect an apartment house of not more than five stories and basement in height, upon the within premises and adjoining premises on the south, *and it is understood and agreed that if the said application is vigorously prosecuted, and if a permit for the erection of said apartment house is denied on or before September 1, 1928, and the party of the second part shall give written notice to the parties of the first part of the refusal to grant such permit on or before September 2, 1928, the within contract shall be null and void and of no effect, and the deposit of \$500.00 paid upon the signing hereof shall be returned to the party of the second part in full satisfaction of any and all damages, if any, that the party of the second part may be entitled to, and upon the return of the aforesaid deposit, neither of the parties hereto shall have any further rights hereunder, in any other event however, said contract is to remain in full force and effect.*” (S. C., p. 65, l. 37, to p. 66, l. 24.)

The notice served by the appellant on September 5, 1928, differs from that served in the Eckhouse case and reads as follows:

“September 1, 1928.

TO ISAAC G. MENDEL and FLORENCE MENDEL, his wife, and DAVID LITWIN, ATTORNEY FOR ISAAC G. MENDEL and FLORENCE MENDEL, his wife:

YOU ARE HEREBY NOTIFIED that the undersigned have vigorously prosecuted the application for a permit for the erection of a five story apartment house upon the premises commonly known as 57-59 Osborne Terrace, Newark, N. J. in accordance with the terms of the contract entered into with Isaac G. Mendel and wife, dated June 27, 1928, *and that a permit for the erection of such a building has been refused.*

You will, therefore, surrender your contract which you hold for the sale of said premises, same now being null and void.

The undersigned likewise is ready to surrender its copy of said contract.

BERWYN ESTATES

By: WILLIAM OKIN,
President.”

(S. C., p. 68, l. 24, to p. 69, l. 9.)

Conclusion.

It is respectfully submitted that the decree of the Court of Chancery in the case at bar should be affirmed with costs.

Respectfully submitted,

DAVID M. LITWIN,
Solicitor for and of Counsel
with the Respondents.

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New Jersey Court of Errors and Appeals

Between

LILLIE ECKHOUSE and ELMER
ECKHOUSE, her husband,
Complainants-Respondents.

and

BERWYN ESTATES, a corpora-
tion,
Defendant-Appellant.

*On Appeal,
etc.*

BRIEF OF RESPONDENTS.

Italics ours except where otherwise noted.)

Statement.

This is an appeal from a final decree advised by the Honorable Maja Leon Berry, Vice-Chancellor, and entered in the Court of Chancery of New Jersey on March 26, 1929. The decree, amongst other things, directed the appellant to specifically perform an agreement made on June 26, 1928, by the respondents as vendors and the appellant as vendee, for the purchase of a parcel of real estate known as 61-63 Osborne Terrace, Newark, New Jersey.

Facts.

This property consists of a tract of land 50 feet front by 150 feet in depth, located on the westerly side of Osborne Terrace, 743 feet south of Clinton avenue, Newark, N. J., upon which there is a two and one-half story frame dwelling and a one and one-half story frame garage.

The contract sought to be enforced is annexed to the bill of complaint and although not printed either as an exhibit annexed to the bill of complaint or as an exhibit in evidence, it is referred to on page 75 of the State of the Case. This is noted in passing, as we intend to refer to a variance in the contract delivered to the respondents and the one retained by the appellant, with respect to the character of the apartment house for which a permit was to be sought.

The contract in suit is the usual contract for the sale and purchase of real estate, with the exceptions hereinafter to be discussed.

The purchase price was twenty thousand dollars (\$20,000.00), of which five hundred dollars (\$500.00) was paid as a deposit on the signing of the agreement. The balance of the consideration of fifteen thousand dollars (\$15,000.00) was to be paid upon the passing of title in the following manner: Three thousand five hundred dollars (\$3,500.00) in cash, subject to adjustments of taxes, etc.; six thousand dollars (\$6,000.00) by the appellant executing, together with at least two of its officers, a purchase money bond and mortgage for that amount, to run for a period of two years; the balance of ten thousand dollars (\$10,000.00) by taking the property subject to a mortgage then upon the premises held by the Girard Life Insurance Company.

The contract contained the following clause:

“This conveyance is also to be made subject to restrictions of record, if any, which do not prohibit, however, the erection of the apartment house hereinafter mentioned” (S. C. 70).

The only other clause of importance contained in the contract is as follows:

“It is understood and agreed by the parties hereto *that the party of the second part*

(*Berwyn Estates*) will apply to the Zoning Board or such other Board having jurisdiction in the City of Newark, for permission to erect an apartment house [OF FIVE STORIES], upon the within premises and adjoining premises, and it is understood and agreed that if the said application is vigorously prosecuted, that if the permit is denied on or before September 1, 1928, the within contract shall be null and void and of no effect, and the deposit herein given shall be returned to the party of the second part. In any other event, however, the said contract is to remain in full force and effect" (S. C. 72).

Both contracts contain the same clause, except that the words "OF FIVE STORIES," *supra*, which we have enclosed in brackets, do not appear in the respondents', but do appear in the appellant's. The appellant's contract is printed in the State of the Case as "Exhibit D. 1" (S. C. 69). It is not disclosed by the contract as printed that the words "Of Five Stories" therein are interlined in ink. It appears from the statement made by counsel for the respondents at the time the contracts were offered in evidence (S. C. 20), however, that this is the fact.

The order of events is important in this case, and we believe a chronological outline will aid the Court in determining the issues involved in this appeal:

1928

- June 26. Contract signed (Exhibit D. 1).
- Aug. 22. Application made to the Building Department, City of Newark, for the erection of a 49-family, five-story apartment house upon the premises of the respondents and the adjoining premises to the north (S. C. 30).

Aug. 23. Application formally rejected by the Superintendent of Buildings of Newark with the following reason noted thereon:

“AREA, HEIGHT AND NUMBER OF FAMILIES EXCEEDED” (S. C. 36).

Aug. 23. An appeal filed with the Board of Adjustment and hearing set for September 6th (S. C. 36).

Sept. 4. Notice of rescission (Exhibit C. 2) left by appellant at 61 Osborne Terrace, the residence of the respondents (S. C. 21).

Sept. 6. Hearing before the Board of Adjustment, appellant not opposing, the application was continued until September 20th (S. C. 30).

Sept. 7. Bill of complaint filed by respondents.

Sept. 20. Continued hearing before the Board of Adjustment adjourned to October 4th (S. C. 37).

Oct. 4. Hearing before Board of Adjustment—applicant present. Application for a modification of the Zoning Ordinance of the City of Newark, denied (S. C. 38).

The appellant filed its answer on October 4, 1928, in which the making of the agreement was admitted, but the breach alleged by the respondents was denied. It was further alleged that the appellant was justified in its refusal to take title to the property, and that the respondents not having complied with their agreement, the respondents, and not the appellant, breached the contract. The first separate defense set forth that the title to the premises in question was, and is, defective and unmarketable in various ways

and that it is subject to restrictions prohibiting the erection of an apartment house. The second separate defense alleges that the bill of complaint was prematurely filed. A cross-bill, included in the answer, alleges that the appellant applied to the Zoning Board or such other Board having jurisdiction in the City of Newark for permission to erect an apartment house of five stories and vigorously prosecuted said application and that the application was denied "within the time contemplated by said agreement," and that therefore the appellant had lawfully rescinded the agreement and by said cross-bill "hereby rescinds same." The prayer in the cross-bill is for the repayment of the down money, with interest and costs and counsel fees incurred in examining the title.

Neither the answer nor the cross-bill is sustained by the evidence, for it is conclusively shown that the permit had not been denied on or before September 1, 1928, which was the date contemplated by the agreement. Furthermore, at the time of the filing of the answer, there had been no search made upon the property and the appellant was in no position either to make or support its allegations of defective and unmarketable title. The validity of the title was never in question, nor was this assigned as a reason for breaching the agreement. The alleged defects were introduced by the appellant in this case as a subterfuge at the last minute and was not a bona fide defense, but was merely an attempt to confuse the issue. The witness Welanko testified that the search offered in evidence, as proof that the title was defective, had been made by him during the week just preceding the trial (S. C. 44). The trial took place on March 19, 1929, more than five months after appellant filed its answer.

The notice served by the appellant on September 4, 1928, is as follows:

“You are hereby notified that the undersigned, in accordance with contract dated June 26, 1928, have attempted to procure a permit for the erection of a five-story apartment house upon the premises commonly known as 61-63 Osborne Terrace, Newark, New Jersey, and that altho the undersigned have vigorously prosecuted the application for same a permit has been refused.

The undersigned, therefore, demands that you return to them the deposit of \$500.00 paid upon the signing of the said contract.”

Argument.

Whatever construction is to be placed upon this notice with respect to the liability of the parties, only one construction can be placed upon it with respect to the continued *existence* of the contract. The demand that the deposit be returned showed beyond peradventure that appellant had no intentions of consummating its agreement by taking title on October 1, 1928.

Under the doctrine of *Hochster v. De La Tour*, 2 El. & Bl. 678, followed in this State in a number of cases, including *O'Neill v. Supreme Council American Legion of Honor*, 70 N. J. L. 410, and which doctrine is specifically applied by the equity courts to suits for specific performance of contracts, the respondents thus acquired a legal right to institute this proceeding without waiting for the stipulated date for performance. *Stein v. Francis*, 91 N. J. E. 205; *Rittenhouse v. Swiecicki*, 94 N. J. E. 36.

The notice of rescission (Exhibit C. 2) was most ill advised. Instead of having the beneficent effect intended, it worked a threefold detriment to the appellant. In the first place, it was

an unqualified refusal to take title in any event and therefore constituted an anticipatory breach of the contract. In the second place, it was a voluntary election of the ground upon which the appellant justified its refusal to take title and thereby limited it to that ground only as a defense to these proceedings. In the third place, the notice stated that the permit had been refused, which was untrue, thereby showing a lack of good faith on the part of the appellant and indicating that its refusal to take title was an attempt to avoid an honest obligation and that the reasons offered in justification of its refusal are wholly captious.

POINT I.

The appellant, having elected and specified as its only reason for repudiating the contract, that the permit had been denied on or before September 1, 1928, it is estopped, after litigation had begun from urging or attempting to prove alleged defects in title about which appellant was theretofore silent.

The appellant's first point is that respondents, vendors, carried the burden of proving that their title was good and that appellant could raise questions of title for the first time at the final hearing. Admitting for the purpose of the argument that this is a correct statement of a general principal of law and that the cases cited by the appellant entirely support its point, it has no application to the case now before the Court for the reason that appellant is estopped from relying upon it.

In the case of the *Ohio and Mississippi Railway Company v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693, Mr. Justice Swayne, in delivering the

opinion of the United States Supreme Court said:

“Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. Gould v. Banks, 8 Wend., 562; Holbrook v. Wright, 24 Wend, 169; Everett v. Saltus, 15 Wend., 474; Wright v. Reed, 3 T. R., 554; Duffy v. O’Donovan, 46 N. Y., 223; Winter v. Coit, 7 N. Y. 288.”

The general principle of law laid down in this case has been applied to a suit by a vendor against a vendee for breach of contract to purchase real estate. In the case of *Cowdrey v. Greenlee*, 126 Ga. 786, 8 L. R. A. (N. S.) 137, it was held:

“The evidence discloses, and the defendant in her answer admitted, that she declined to complete the purchase for two reasons, and for two reasons only; therefore she could not urge in defense to the suit any additional objections to the title, nor could she call upon the plaintiff to assume the burden of proving that the title was without blemish. All it was necessary for the plaintiff to establish was that, under the terms of the written agreement, the defendant was unwarranted in declining to perform for either of the reasons assigned by her, and had, by waiving all other objections which might have been urged, relieved the plaintiff of all obligations to take further steps to comply with her original undertaking to make satisfactory showing as to title.”

Although we can find no case in point in New Jersey, it has been recognized not only in the Federal Courts and Georgia, but elsewhere, as illustrated by the following cases: *Schearer v.*

Prudential Insurance Company of America, (Nebraska) 56 L. R. A. 611, and the cases therein cited; *Snyder v. Supreme Ruler, etc.*, (Tennessee) 45 L. R. A. (N. S.) 209, (this case was affirmed by the Supreme Court of the United States, 227 U. S. 497, without however, any discussion of our principle); *Mecklenburg Real Estate Company v. Kyoleum Company*, (Ten.) 14 A. L. R. 944; *Brainiff v. Baier*, (Kan.) L. R. A. 1917 E. 1036.

It is respectfully submitted that the application of this doctrine is dispositive of the entire case, and that the appellant is estopped from urging as a defense any questions of title (Points 1, 2, 3 and 4 of appellant's brief are based on title questions-, or any questions of hardship (Points 5, 6, 7, 8 and 9 of appellant's brief are based on questions of hardship). We submit, therefore, that this doctrine limits the appellant's defense to the single ground, that a permit to erect the apartment house was refused on or before September 1, 1928. The appellant does not present any argument upon this point as a ground for reversal, for the very good reason that, as it admitted at the hearing, a permit had not been refused on or before September 1, 1928. This situation leaves appellant without any defense whatsoever to the relief asked for by the respondents and requires an affirmance of the decree appealed from.

POINT II.

The conduct of the appellant, both in the giving of the notice of rescission and at the trial was captious and its defense was interposed in bad faith. Its entire conduct was inequitable.

The respondents are of the opinion that the conduct of the appellant completely estopped it

from setting up any defects in title or question of hardship, either in the court below or upon this appeal.

Notwithstanding that the estoppel is an insurmountable obstacle to the appellant in its effort to reverse the decree sub judice and that the argument under Point I of this brief is dispositive of the entire case, we cannot refrain from pointing out the inequitable manner in which appellant has conducted itself, the captious and untenable nature of its entire defense and its utter lack of good faith in refusing to consummate its contract.

1. The notice of rescission (Ex. C. 2) served by appellant on September 4, 1928 stated that a permit had been denied.

This was wholly false.

2. This notice, untrue in fact, was obviously intended to terminate the contract. *By its cross-bill appellant alleged that it had rescinded the agreement* and by its admissions at the hearing conceded that the respondents would have been protected had they sold the property to a third person, (S. C. 25.) thereby showing that its intention was, in fact, to terminate the contract by the notice. The appellant subsequently sought to change its position on this point however, for, counsel for appellant contended (S. C. 24) that the notice was not intended as a rescission of the contract but was given merely for the purpose of protecting his client. What protection the appellant needed we are unable to understand. No notice was required under the Eckhouse contract. In other words, the appellant could have waited until October 1, 1928 (the date set for closing title) and refused to accept the deed either on the ground that a permit had

been denied on or before September 1, or that title was defective and unmarketable, or on both grounds.

The point is that the contention that the appellant "had to give that notice to protect," (S. C. 24) itself is entirely without foundation, ill-conceived and illogical.

3. The appellant rests its defense in a large measure upon certain alleged defects in title. These objections were never brought to the attention of the respondents nor were respondents requested to clear the title nor did appellant attempt to clear the title (S. C. 49). The first mention of title objections is found in appellant's answer filed on October 4, 1928. At the hearing it was admitted that the search offered in substantiation of the allegations of the answer, had not been made until March, 1929. It appears that at the time of filing its answer the appellant alleged that the title was defective without knowing whether it was or not.

Questions respecting the title to the premises to be conveyed were not made an issue by the appellant in this case. The only question which the Court of Chancery was called upon to determine was whether or not the appellant was justified in its attempted rescission of the contract. The determination in this case was that the contract was still in full force and effect. That this was the real contention of the appellant is shown by the fact that:

(a) Its only reason for repudiating the contract is stated in its notice attempting to rescind it.

(b) That it demanded a return of its down money.

(c) That at the time that the notice attempting to rescind the contract was served, it had no knowledge of any alleged defects in title, inasmuch as no examination of the title had been made by the appellant.

(d) That as a matter of fact it never knew anything concerning the condition of the title until a week before the hearing in the Court below, when an attempted examination of the title was made on behalf of the appellant.

Furthermore, it must be realized that not every objection to title is sufficient to defeat an action for specific performance.

In 25 R. C. L. 275 we find the following statement:

“While a purchaser cannot be compelled to take a doubtful title, he will not be permitted to object to a title on account of a bare possibility that it will prove defective. An objection to a title should have some merit in order to defeat the claim of the vendor to the specific performance of the contract of sale.”

We submit that the objections to the title raised in the appellant's brief are petty and captious on their face.

4. The lands in question are located on the westerly side of Osborne Terrace about 750 feet north of Clinton avenue, in the City of Newark and are a part of a tract of land originally owned by James H. Osborne and Robert A. Osborne. This particular tract covered all the land on Osborne Terrace, south of Clinton avenue for a distance of twelve hundred feet. The original owners subdivided this large tract into plots of fifty feet front by one hundred and fifty feet

in depth and in the deeds of conveyance for these lots, inserted the following building restrictions:

“The said party of the second part for himself, his heirs, and assigns, doth covenant to and with the said party of the first part, their heirs, executors and administrators, that neither the said party of the second part, nor his heirs or assigns, shall or will at any time hereafter erect upon said lot any building other than a dwelling house and its appropriate buildings, the said dwelling house to cost in no case less than three thousand dollars, and to be located at least twenty feet distant from the line of Osborne Terrace.”

There is a similar restriction found in the title to the lands owned by the respondents. In 1913 upon a tract of land 100 feet to the north of the property of the respondents, (the intervening fifty feet being the subject of the suit jointly tried below), the owner attempted to erect what at that time was a modern, high-class apartment house, three stories high.

The neighbors, all of whom owned property which came out of the Osborne tract, through one Edward Underwood, sought to restrain the erection of such a building within the restricted area. A bill of complaint was filed in the Court of Chancery by Underwood against the owners, Herman & Co., and the Vice Chancellor before whom the matter was tried, upon final hearing, advised a permanent injunction restraining the erection of such a building. Upon appeal, *Underwood v. Herman & Co.*, 82 N. J. Eq. 353, this decree was reversed, and Justice Minturn, writing the opinion of this Court said:

“The grantors in their covenant made no attempt by language to define the meaning of a ‘dwelling house and its appropriate buildings’ but allowed each grantee, in the practical adaptation of the land to his per-

sonal requirements to construe the language of the covenant to meet the personal exigency. In this manner language of an uncertain and indefinite character received a practical interpretation upon the land by the grantees, presumably with the acquiescence of the grantors, and prior grantees. This practical interpretation of the covenant which the learned Vice Chancellor has found to exist emphasizes the contention that the variations and departures from the strict terms of the covenant are due to its uncertainty and indefiniteness, factors which bring the case within the application of the doctrine of the cases to which we have referred, and which require the reversal of the decree appealed from."

This case is dispositive of the contention of the appellant that the restrictions to which the conveyance was to be subject, prohibit the erection of an apartment house, in violation of the express covenant in the agreement.

We submit that the restrictions do not prevent the erection of an *apartment house* and that that is all the respondents warranted in the contract. However, we do not agree with the appellant's contention that the Herman case is limited to holding merely that *an injunction will not issue to restrain the erection of a three story apartment house* within the restricted tract. We maintain that the decision is much broader; that it holds that the language of the restriction is too indefinite and uncertain to limit the character of the buildings to be erected within the tract to any particular type of dwelling; and that the land is not subject to this building restriction. We submit that the decision would have been the same had Herman & Co. attempted to erect a four, five, or six story apartment house.

The appellant relies on these restrictions nevertheless as a ground for resisting specific per-

formance. It attempts, under the fourth point of its brief, to evade the full force of the construction already placed upon these restrictions. Such efforts are futile and unavailing in view of the opinion of Backes, *V.-C.* in *Shoyer v. Mermelstein*, 93 Eq. 57. In that case, the Vice Chancellor was called upon to examine the restrictive covenants in a tract of land formerly owned by one Sanford. The same covenants had previously been construed by the Court of Chancery and its construction affirmed by the Court of Appeals in *Sanford v. Keer*, 80 N. J. Eq. 240. Shoyer sought to restrain a violation of these covenants in his suit against Mermelstein and Vice-Chancellor Backes held:

“That the restrictive covenants exacted by the Sanfords from the purchasers of their lots, constituted a neighborhood or community scheme, was found as a fact by this Court and was approved by the Court of Appeals in *Sanford v. Kerr*, *supra*. *The situation remains unchanged, and that question must be regarded as settled.*”

In other words, where a court of equity has placed a construction on a certain restrictive covenant, the matter is *res adjudicata* with respect to all subsequent proceedings based upon the same covenant. In the Sanford case the restrictions had been found to be enforceable so that at a later date Backes, *V.-C.* was obliged to regard the question as settled, “since the situation remains unchanged,” *i. e.* the restrictions not having been abandoned. In the Herman case the restrictions have been held to be unenforceable so that now that question must be regarded as settled and furthermore whether the “situation remains unchanged” is immaterial.

Appellant argues (Point 6) that the Herman case is in no way conclusive upon neighboring

owners. This however is not in accord with our understanding of the Shoyer case. In the Sanford case the defendant was the owner of a lot on South Tenth street. In the Shoyer case the defendant was the owner of a lot on South Eleventh street. The parties to the actions were different. The Shoyer case holds then that an adjudication between two persons concerning a particular lot of land subject to a certain restrictive covenant is conclusive as to all other persons and all other property subject to the same covenant.

In 15 R. C. L. 993 this rule is expressed as follows:

“Judgments or decrees in Chancery, affecting rights of parties to property, bind the parties before the Court and those who stand in privity with them, and so long as they remain in force put an end to all further controversy concerning the points decided between the parties to the suit.”

Appellant argues (Point 6) that “The question is not whether the language is so free from doubt that an injunction will issue but whether the appellant be compelled to take the risk of litigation.” We have shown that under the restriction complained of no one could prevail in an action against the appellant for erecting its apartment house. Surely specific performance is not to be refused merely because some one may bring an action which he is certain to lose.

As was said by Buchanan, *V.-C.*, in *Smith v. Reidy*, 92 Eq. 586, a case similar to case at bar and which is cited by appellant in the brief;

“Of course, in one sense, each of us is always exposed to litigation; suit may be brought unjustifiably against anyone, through ignorance or malice.”

The true test, according to this learned jurist, is whether there is a possibility,

“that a reasonable man, advised by ordinarily competent counsel, might sue in respect of these covenants, in the expectation or belief that a successful outcome was not beyond the bounds of reasonable possibility.”

Applying this test it cannot be said that such a man could be so optimistic in the face of a decision of this Court holding that the land is not subject to the restriction.

Appellant also expresses an apprehension that it might be held liable in a suit for damages for violation of the covenant. The decree in the Herman case, however, would be a bar to any action, either in equity or at law.

In 15 R. C. L. 993 it is stated that:

“Whenever the parties to a suit, and the subject matter in controversy between them, are within the regular jurisdiction of a court of equity, the decree of that court is to every intent as binding as would be the judgment of a court of law, and is available as a former adjudication whether the subsequent action is at law or in equity.”

In view of the construction already placed on this restriction by this court we submit that the appellant's argument on this point is not made in good faith.

5. (a) The appellant argues that enforcement of the contract will be a hardship inasmuch as “it cannot use the premises for the contemplated five-story apartment house building.” (Point 1.) We object to the use of the words “contemplated five-story.” It is to be remembered that the words “five story” do not appear in our copy of the contract. In its Statement of Facts appellant admits this but adds that they “appear in

the Mendel contract and the two agreements were so closely tied up that what was intended for one was unquestionably intended for the other." While it is perfectly true that the two agreements are intimately related, counsel for appellant goes too far in saying that the details of the contracts were unquestionably intended to be the same. The contracts were executed on different days; they were drawn by different attorneys; and they are dissimilar in other respects as for example, the provision for notice in the Mendel contract which does not appear in the Eckhouse contract. But aside from that the appellant did not condition its contract on securing a permit for any particular apartment house. We submit that this is all *aliunde* the record, there being nothing in the case to indicate that the appellant cannot secure a permit to erect an apartment house or even a five-story apartment house, assuming even (but not admitting), for the sake of argument, that appellant could inject this "five-story apartment house" feature into the case.

It appears that the only objection made at the hearing before the Board of Adjustment was that the building was not to be set back on a line with the other houses (S. C. 38). If the appellant had not arbitrarily refused to set his building back the objections would have been withdrawn and the logical inference is that the permit would have been granted.

Appellant claims (Point 7) that it "cannot erect its contemplated five-story apartment house building with a twenty-foot set back." We maintain however, that this is no fault of the respondents. We reiterate that the respondents did not warrant that any apartment house could be erected upon the premises and that appellant

can change its plan, if necessary, in order to provide a twenty-foot set back. Certainly a twenty-foot set back provision does not *ipso facto* prevent the erection of an apartment house .

Two other points are stressed by appellant under its point of hardship. *First*, it says that the contract is incomplete in that it "nowhere states what is to happen in the event that the application is not acted upon by September 1st." (Point 1). Instead of being incomplete on this score the contract clearly indicates that the intention of the parties was that in only one event was the contract to be void—in case the permit was *denied* on or before September 1, 1928. If the permit was not denied on or before that date, either because it had been granted or had not been acted upon, the contract was to remain in full force and effect. The case of *Orange Society v. Konski*, 94 N. J. Eq. 632, cited in appellant's brief has not the slightest application to the case before the Court. In the *Konski* case the *agreement* was:

"If the necessary plans for the erection of the said building are neither approved nor rejected by the 10th day of October."

Appellant argues that the *Konski* contract "provided for both approval and non-approval—a complete contract." The answer is that it provided for both approval and non-approval *an entirely different contract* from that now sued upon.

Second, appellant says that the time for obtaining the permit was not of the essence. Here again it quotes from the *Konski* case, ending its quotation with the phrase, "it is quite evident from what transpired that neither party regarded performance on that date imperative." A reading of the case will show what the Vice-

Chancellor meant, for two sentences further on he says:

“I need not dwell longer on that phase, because, even if punctual performance was considered essential at the time the contract was made, it was waived.”

In the case before the Court the conduct of the parties, instead of indicating a waiver, shows that they both considered time of the essence. Appellant must have so considered it in serving its notice (Exhibit C. 2). This notice was dated September 1, and stated that a permit having been refused the contract was at an end. Obviously, at the time appellant served this notice, it considered time of the essence for it attempted to take advantage of that fact. It can not now be heard to say that time was not of the essence. The respondents have always understood that time was of the essence as indicated by the fact that they filed their bill within a week after September 1 and three days after receipt of the notice. Although a contract does not expressly provide that time is of the essence, it will be so considered when the facts submitted show that the parties intended that the time fixed should be of the essence. *Agens v. Koch*, 74 N. J. E. 528; *Gerba v. Metviska*, 84 N. J. E. 79, affirmed in 84 N. J. E. 141.

We submit that the appellant's plea of hardship is without substance, is purely an afterthought and is as devoid of merit as it is captious and untenable.

(b) The appellant makes the point (Point 3) that it can urge questions of hardship on this appeal since “*an appeal in equity is a trial de novo.*” On this point it is entirely mistaken, for the New Jersey courts have held otherwise. In *New Jersey Franklinite Co. v. Ames*, 12 N. J. E.

507, Green, *C. J.*, in speaking for the Court of Errors and Appeals said:

“This application is made to an appellate tribunal having no original jurisdiction. Its constitutional powers are purely appellate. Its office is simply to review the decrees of the Court of Chancery at the instance of a party aggrieved by the decision of that court, and to decide whether the Chancellor erred or not upon the case before him. And, admitting the power in this court to introduce new parties and new facts, how is the matter to be dealt with? If the applicants’ case is presented upon petition and affidavits, are they to be met by counter affidavits to ascertain the truth? And when the facts are ascertained, if the court think that the applicants should be made parties, how is the bill to be amended, the parties to be brought before us, the pleadings to be filed, and the rights of parties to be settled in this court? How many questions are we to settle that the Chancellor has never heard of in the cause? What will the proceedings be but a bold and lawless usurpation of original jurisdiction?”

In the case of *Black v. Delaware & Raritan Canal Co.*, 24 N. J. E. 455 at 477, the Court of Errors and Appeals held:

“In this court of purely appellate jurisdiction, the struggle must be decided upon the case that was made before the Chancellor, no new facts can be introduced here by testimony.”

A reading of the following excerpt from 2 R. C. L. 69, discloses this to be the general rule:

“The general rule is that an appellate court will consider only such questions as were raised in the lower court. This rule is so well settled as to be almost unquestionable * * * An all-sufficient reason for the existence of this rule is that if the question had been raised in the lower court the objection might have been remedied, and otherwise if an objection not raised

below could be raised in the appellate court there would be no assurance of any end to the litigation, as new objections could continuously be raised on successive appeals.”

It is respectfully submitted that appellant has failed to digest the purport of the decisions it relies upon and the authorities cited have no application to the facts in the case at bar.

CONCLUSION.

The appellant having entered into a contract to purchase the property of the respondents under the terms of which the appellant had the right to rescind, if a permit for the erection of an apartment house upon these premises and the adjoining premises was denied on or before September 1, 1928, and the appellant having served a notice dated September 1, 1928, of its rescission of said contract upon the ground that the permit had been denied, the contents of which were untrue, thus committing an anticipatory breach of the agreement and the respondents having instituted their suit to compel the specific performance thereof, and the appellant having assigned a reason for its rescission and being estopped from setting up any other reason for its refusal to take the title and having conducted itself inequitably and in bad faith and interposed a wholly captious defense, the respondents are entitled to an affirmance of the Decree of the Court of Chancery with costs.

Respectfully submitted,

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Solicitor for and of Counsel with
the Respondents.

October Term, 1929.

JACOB L. NEWMAN,
SAUL J. ZUCKER,
On the Brief.

