

## INDEX.

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|   | PAGE |
|---|------|
| Notice of Appeal .....                          | 1    |
| Grounds of Appeal .....                         | 2    |
| Original Summons .....                          | 3    |
| Complaint .....                                 | 4    |
| Summons to Added Defendant .....                | 7    |
| Answer and Counterclaim .....                   | 8    |
| Answer of Added Defendant .....                 | 17   |
| Notice of Motion to Strike Out .....            | 19   |
| Affidavits for Plaintiff .....                  | 20   |
| George Grossman .....                           | 20   |
| Herman Bardack .....                            | 24   |
| Clarence L. Dunham .....                        | 26   |
| Leo Blumberg .....                              | 28   |
| Howard R. Cruse .....                           | 30   |
| Plaintiff's Exhibits .....                      | 32   |
| Report of Title .....                           | 32   |
| Articles of Agreement .....                     | 33   |
| <i>Survivor</i> Affidavits for Defendants ..... | 36-A |
| Affidavit of William J. Murphy .....            | 37   |
| Affidavit of Henry J. Byrne .....               | 39   |
| Defendants' Exhibit—Sale poster and letter..    | 43   |
| Suggestion of Death of Henry Byrne .....        | 45   |
| Rule Substituting Executors as Defendants..     | 46   |
| Order Striking Out Answer .....                 | 47   |
| Rule for Judgment .....                         | 49   |

New Jersey State Library

1871

Notice of Appeal.

New Jersey Supreme Court

GEORGE GROSSMAN,  
*Plaintiff,*

10

*against*

LINCOLN TRUST COMPANY OF NEW  
JERSEY and HENRY J. BYRNE,  
Executors of Henry Byrne,  
Deceased, ANNA BYRNE and  
HERMAN BARDACK,  
*Defendants.*

The defendants, Lincoln Trust Company of New Jersey and Henry J. Byrne, Executors of Henry Byrne, deceased, and Anna Byrne hereby give notice that they appeal to the New Jersey Court of Errors and Appeals in the last resort in all causes from the judgment and order of the New Jersey Supreme Court made by Hon. Frank L. Cleary, Supreme Court Commissioner, in and whereby the answer and counterclaim filed herein by the defendants, Henry Byrne and Anna Byrne, are stricken out and for nothing holden.

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Dated

Yours respectfully,

RICHARD DOHERTY.  
Attorney of Defendants, Lincoln Trust Co. of New Jersey and Henry J. Byrne, Executors of Henry Byrne, Deceased, and Anna Byrne.

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To

GROSS & GROSS, Esqs.,  
Attorneys of Plaintiff.

**Grounds of Appeal.**NEW JERSEY COURT OF ERRORS AND  
APPEALS.

|    |   |  |
|----|---|--|
| 10 | <p style="text-align: center;">GEORGE GROSSMAN,<br/><i>Plaintiff-Appellee,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">HENRY BYRNE and ANNIE BYRNE,<br/><i>Defendants-Appellants,</i></p> <p style="text-align: center;">HERMAN BARDACK,<br/><i>Defendant-Appellee.</i></p> | <p>On Appeal from<br/>Rule Striking<br/>Out Answer and<br/>Counterclaim.</p> |
|----|---|--|

20 The above named Henry Byrne and Annie Byrne, defendants-appellants, hereby assign the following grounds for the reversal of the rule of the New Jersey Supreme Court made July 24th, 1928, striking out the answer and counterclaim filed by the said appellants:

1. Said answer and counterclaim are not sham and frivolous, and filed merely for the purpose of delay.
2. Said answer presented facts sufficient to entitle the defendants to defend.
- 30 3. Said counterclaim set forth a valid cause of action against the plaintiff.
4. The allegations of the said answer setting forth (a) a modification of the contract in the complaint referred to, (b) the breach thereof by the plaintiff, (c) the waiver of the special clause therein relating to the issue of a title policy free and clear from exceptions, (d) the readiness, ability and will-

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*Original Summons.*

ingness of the appellants to convey title to said lands in accordance with the contracts so modified, (e) the refusal of the plaintiff to execute, deliver or tender to the appellants in performance of said contract the mortgages therein provided, constituted valid defenses to said action. 10

5. The denials contained in said answer created issues of fact determinable only by a trial.

6. The answer, the counterclaim and the appellants' proof submitted on the hearing of the motion to strike out disclosed that substantial questions of fact were involved. 20

Dated August 1st, 1928.

RICHARD DOHERTY,  
Attorney of and Counsel with Appellants.

**Original Summons.**

The State of New Jersey:

To Henry Byrne and Anna Byrne. You are summoned to answer the annexed complaint of George Grossman, in an action at law in the Supreme Court. 30

[L. S.] And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

WITNESS, William S. Gummere, Esq., Chief Justice of the Supreme Court, at Trenton, this Twelfth 40

*Complaint.*

day of December, Nineteen Hundred and Twenty-seven.

EDWARD J. KELLEHER,  
Clerk.

10 GROSS & GROSS,  
Attorneys.

**Complaint.**

NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

|    |  |   |                |
|----|--|---|----------------|
| 20 | <p style="text-align: center;">GEORGE GROSSMAN,<br/><i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">HENRY BYRNE and ANNA BYRNE,<br/>his wife,<br/><i>Defendants.</i></p> | } | Action at Law. |
|----|--|---|----------------|

Plaintiff, residing in the City of Jersey City, County of Hudson and State of New Jersey, says that:

30 1. On May 5, 1927, the defendants Henry Byrne and Anna Byrne, his wife, entered into a contract with the plaintiff, wherein and whereby said defendants agreed to convey to the plaintiff, on the 1st day of July, 1927, certain lands and premises described in said contract, free from all encumbrances, for the consideration or sum of \$25,500.00, the original of which said contract the plaintiff can produce at any time.

40 2. The lands and premises to be conveyed are described in said contract as follows:

*Complaint.*

ALL those lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, known as lots twenty-two (22) and twenty-three (23) and twenty-seven (27) and twenty-eight (28) in City Block 1764; consisting of six houses known by street numbers 292-292a-294-302-302a and 306 Virginia Avenue, Jersey City, N. J.; being premises described in two deeds to Henry Byrne herein, and which premises shall be described by metes and bounds in the conveyance to be made to the party of the second part. 10

3. At the time of the execution and delivery of the contract aforesaid the plaintiff paid to said defendants the sum of \$500.00 on account of the purchase price of said lands and premises, the receipt of which was duly acknowledged by the said defendants. 20

4. The contract aforesaid contained a clause as follows:

“The party of the first part agrees to convey a marketable title, the test of marketability to be the furnishing of a title policy without exceptions by the New Jersey Title Guarantee & Trust Company”; 30

(the party of the first part in said contract being the defendants herein).

5. The said defendants were not, on the 1st day of July, 1927, or at any time prior to or since said date, ready, able or willing to convey to the plaintiff the lands and premises in said contract by them 40

*Complaint.*

10 agreed to be conveyed, free from all encumbrance, and in such a manner as to furnish a title policy without exceptions by the New Jersey Title Guarantee & Trust Company, but on the contrary there were various encroachments existing as to the buildings upon the lands and premises described in the contract; amongst others the premises 292 Virginia Avenue encroached upon the lands on the west; premises 294 Virginia Avenue encroached upon the premises on the east, etc., etc., and the said New Jersey Title Guarantee & Trust Company was not willing to and still is not willing to grant a title policy free and clear of exceptions, but is desirous of excepting mislocations and encroachments as shown by survey.

20 6. Plaintiff was at all times ready, able and willing to perform the said contract in all things on his part, and has performed all of the conditions thereof on his part to be done and performed, but the said defendants have defaulted therein in the particulars above mentioned.

30 7. Plaintiff has incurred expense for the examination of the title to said lands and premises in the sum of \$300.00 for search and survey fees, which is a reasonable charge therefor.

8. Plaintiff has demanded of the defendants that they return the aforesaid sum of money to him, and although the defendants have frequently promised to do so, the same has not as yet been paid.

Judgment will be demanded in the sum of \$800.00, with interest on \$500.00 thereof from the 5th day of May, 1927.

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GROSS & GROSS,  
Attorneys of Plaintiff.

**Summons to Added Defendant.**

THE STATE OF NEW JERSEY to HERMAN BARDACK.

(L. S.) You are summoned to answer the annexed complaint (by way of counterclaim) of Henry Byrne and Anna Byrne, in an action at law in the Supreme Court. And take notice that unless you

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file your answer to said complaint with the clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint (by way of counterclaim), the defendants, Henry Byrne and Anna Byrne, may proceed in the suit, and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Esq., Chief Justice of the Supreme Court, at Trenton, this thirtieth day of December, nineteen hundred and twenty-seven.

20

EDWARD J. KELLEHER,  
Clerk.

RICHARD DOHERTY,  
Attorney.

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**Answer and Counterclaim.**  
 NEW JERSEY SUPREME COURT,  
 HUDSON COUNTY.

10

GEORGE GROSSMAN,  
*Plaintiff,*

*v.*

HENRY BYRNE, ANNA BYRNE and  
 HERMAN BARDACK,  
*Defendants.*

Action at Law.

Answer of Henry  
 Byrne and Anna  
 Byrne and  
 Counterclaim  
 Against George  
 Grossman and in  
 the Alternative  
 Herman Bardack.

20

The defendants, Henry Byrne and Anna Byrne, residing in the City of Jersey City, County of Hudson and State of New Jersey for answer to the plaintiff's complaint says:

1. They admit the allegations of paragraph 1 of the complaint, but say that they have no knowledge or information whereof to form a belief as to whether the above named plaintiff entered into the contract therein mentioned as principal or as agent of the above named defendant, Herman Bardack.

30

2. They admit the allegations of paragraph 2 of the complaint.

3. They admit the allegations of paragraph 3 of the complaint, but say that they have no knowledge or information whereof to form a belief as to whether said payment was made by the plaintiff as principal or as agent for the said Herman Bardack.

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4. They admit the allegations of paragraph 4 of the complaint, but say that after the making of the

*Answer and Counterclaim.*

contract in said complaint mentioned, the same was by the mutual agreement of the plaintiff and the defendants, Henry Byrne and Anna Byrne, so modified as to eliminate therefrom the provision that the test of marketability of the title was to be the furnishing of a title policy without exceptions by the New Jersey Title Guarantee & Trust Co. 10

5. They deny the allegations of paragraph 5 of the complaint, except that they say that the contract referred to in paragraph 4 was after the making thereof modified by the mutual agreement of the plaintiff and the defendants, Henry Byrne and Anna Byrne, so as to eliminate therefrom the provision that the test of marketability of the title was to be the furnishing of a title policy without exceptions by the New Jersey Title Guarantee & Trust Co. 20

6. They deny the allegations of paragraph 6 of the complaint.

7. They deny the allegations of paragraph 7 of the complaint.

8. They deny the allegations of paragraph 8 of the complaint.

FIRST SEPARATE DEFENSE TO COMPLAINT. 30

After the making of the contract referred to in said complaint, the same was by the mutual agreement of the plaintiff and the defendants, Henry Byrne and Anna Byrne, so modified as to eliminate therefrom the provision that the test of marketability of title to be conveyed by the defendants, Henry Byrne and Anna Byrne, was to be the furnishing of a title policy without exceptions by the New Jersey Title Guarantee & Trust Co. 40

*Answer and Counterclaim.*

## SECOND SEPARATE DEFENSE TO COMPLAINT.

10 July 1st, 1927, the plaintiff entered in and upon the said lands and premises in the contract mentioned and from thenceforth had possession of the same and excluded the defendants Henry Byrne and Anna Byrne, therefrom, and took the rents, issues and profits to his own use, well knowing at said time that the New Jersey Title Guarantee & Trust Co. had not issued, nor had it by the said plaintiff been solicited to issue, a title policy free from exceptions, and the plaintiff is estopped to deny that the defendants, Henry Byrne and Anna Byrne were not on the first day of July, 1927, or at any time prior to, or since said date, ready, able and willing to convey a marketable title to said lands, the test of which marketability was to be the furnishing of a title policy without exceptions by the New Jersey Title Guarantee & Trust Co.

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## THIRD SEPARATE DEFENSE TO COMPLAINT.

30 July 1st, 1927, and hitherto, the plaintiff, well knowing that the said New Jersey Title Guarantee & Trust Co. was not willing to issue a title policy free and clear from exceptions, but was desirous of excepting mislocations and encroachments as shown by survey, waived the clause of the said contract providing that the test of marketability of title was to be the furnishing of such title policy.

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## FOURTH SEPARATE DEFENSE TO COMPLAINT.

40 The defendants, Henry Byrne and Anna Byrne, on the first day of July 1927, and at all times hitherto have been ready, able and willing to convey to the plaintiff title to said lands and premises which was, and is, marketable in fact and law.

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*Answer and Counterclaim.*

## FIFTH SEPARATE DEFENSE TO COMPLAINT.

July 1st, 1927, and hitherto, the plaintiff neglected and refused to execute and deliver to the defendants, Henry Byrne and Anna Byrne, in performance of the covenants of the said contract, six separate mortgages in the principal sum of \$3,850 each, each mortgage to be a lien on one of the houses and lots in the said contract mentioned and to be for a period of ten years with annual installments of \$100.00 each and further neglected and refused to pay to the defendants, Henry Byrne and Anna Byrne, as part of the purchase price and in further fulfillment of the said contract the sum of \$1,900.

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## COUNTERCLAIM.

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The defendants, Henry Byrne and Anna Byrne, by way of counterclaim against the plaintiff, George Grossman and in the alternative Herman Bardack, say:

1. May 5th, 1927, the plaintiff, George Grossman signed a contract in writing in and whereby the defendants, Henry Byrne and Anna Byrne, agreed to convey on the first day of July, 1927, and the said George Grossman agreed to purchase for the sum of \$25,500.00 the lands and premises described in paragraph 2 of the complaint; by said contract it was further provided that on said first day of July, 1927, the said purchaser, his heirs and assigns could enter in and upon the said lands and premises and from thence take the rents, issues and profits to his and their own use and by said contract it was further provided that the purchase price of said lands and premises should be paid and satisfied by a cash deposit upon the execution

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*Answer and Counterclaim.*

10 thereof, the execution and delivery of six separate mortgages in the principal sum of \$3,850.00 each to be made and delivered on said first day of July 1927, and by the payment of cash at said time in the sum of \$1,900.00, all of which will more fully appear by reference to a copy of said contract hereto annexed.

20 2. The making of said contract, negotiation of the terms thereof, the entry upon the premises and the collection of rents therefrom and the dispossession of tenants thereof as hereinafter stated was in fact done and performed by the defendant, Herman Bardack, and these defendants, Henry Byrne and Anna Byrne do not know whether said contract was signed by the plaintiff, George Grossman as principal for his own benefit, or whether in the signing thereof he acted as the agent of the said Herman Bardack.

3. The defendants, Henry Byrne and Anna Byrne have at all times been ready, able and willing to carry out the terms, provisions and covenants of the said contract of sale.

30 4. July 1st, 1927, and at all times thereafter the said George Grossman and Herman Bardack have neglected and refused to make and execute to the defendants, Henry Byrne and Anna Byrne, the six separate mortgages in the total sum of \$23,100.00 as by said contract they were required to do and have at all times refused and neglected to pay to the said defendants, Henry Byrne and Anna Byrne, the sum of \$1,900 likewise provided in said contract.

40 5. July 1st, 1927, the plaintiff, George Grossman and the defendant Herman Bardack entered

*Answer and Counterclaim.*

into and upon the said lands and premises and from thence until the first day of September, 1927, took the rents, issues and profits therefrom. Thereafter, to wit, September 1st, 1927, the said George Grossman and Herman Bardack caused a great number of tenants, to wit, ten tenants, who at that time were paying rent in a great amount, to wit, \$200.00 per month, to vacate the said premises so that thereafter the same was unproductive of any income, and with the premises so vacated, they thereupon advertised the said premises for sale at public auction and endeavored by such means to dispose of the same. 10

6. On or about November 15th, 1927, the plaintiff, George Grossman and defendant, Herman Bardack wholly repudiated their obligations under said contract and declared to the defendants, Henry Byrne and Anna Byrne that they would not perform the said contract nor accept the conveyance of title to said premises. 20

7. By means thereof the defendants, Henry Byrne and Anne Byrne, have lost divers large gains and profits, to wit, \$2,000.00, which they would otherwise have received from the rents and income of said premises, will be compelled to lay out and expend a large sum of money, to wit, \$1,000.00 in and about procuring the re-rental of said lands and premises and have lost divers large sums of money, to wit, \$5,000.00 which they otherwise would have earned and acquired through the sale thereof and were otherwise greatly injured. 30

The defendants, Henry Byrne and Anna Byrne, demand damages of the plaintiff, George Gross-

*Answer and Counterclaim.*

man, or in the alternative of Herman Bardack in the sum of \$8,000.00.

RICHARD DOHERTY,  
Attorney of Defendants,  
Henry Byrne and Anna Byrne.

10

ARTICLES OF AGREEMENT, made the fifth day of May in the year of Our Lord One Thousand Nine Hundred and twenty-seven

BETWEEN

Henry Byrne and Anna Byrne, his wife of the City of Jersey City, in the County of Hudson and State of New Jersey, party of the first part;

20

AND

George Grossman of the City of Jersey City, in the County of Hudson and State of New Jersey, party of the second part;

30

WITNESSETH, that the said party of the first part for and in consideration of the sum of Twenty-five Thousand Five Hundred (\$25,500) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of bargain and sale free from all encumbrance on or before the first day of July next ensuing the date hereof, all those lots, tracts, or parcels of land and premises, hereinafter particularly described situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey,

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*Answer and Counterclaim.*

known as lots twenty-two (22) and twenty-three (23) and twenty-seven (27) and twenty-eight (28) in City Block 1764; consisting of six houses known by street numbers 292-292a-294-302-302a and 306 Virginia Avenue, Jersey City, N. J.; being premises described in two deeds to Henry Byrne herein, and which premises shall be described by metes and bounds in the conveyance to be made to the party of the second part.

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AND the said George Grossman for himself, his heirs, executors and administrators, doth covenant, promise, and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he 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 sum of Twenty-five Thousand Five Hundred (\$25,500) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

20

Cash deposit on execution of this contract, receipt whereof is acknowledged by the party of the first part, the sum of .....

\$500.00

30

By taking the property subject to six separate mortgages of the principal sum of Thirty-eight Hundred Fifty (\$3850) Dollars each, each mortgage to be a lien on one of the houses and lot hereinbefore mentioned and to be for a period of ten (10) years with installments of One Hundred (\$100.00) Dollars, payable on each mortgage annually for the first five years of said mortgage;

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*Answer and Counterclaim.*

|    |  |             |
|----|--|-------------|
|    | said mortgage further to contain a clause that the mortgagor may pay off said mortgage at any time before maturity ..... | 23,100.00   |
| 10 | Balance in cash at closing of title, the sum of .....  | 1,900.00    |
|    |  | <hr/>       |
|    |  | \$25,500.00 |

The party of the first part agrees to convey a marketable title, the test of marketability to be the furnishing of a title policy without exceptions by the N. J. Title Guarantee & Trust Co.

20 Taxes, interest, rents, and fire insurance premiums to be adjusted and apportioned as of the date of closing of title.

Risk of loss by fire or otherwise, pending closing of title, to be borne by the party of the first part.

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

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed shall be delivered and received at the offices of Gross & Gross, 15 Exchange Pl., Jersey City, N. J., between the hours of ten in the forenoon and four o'clock in the afternoon on the said first day of July next ensuing the date hereof.

40 AND for the performance of all and singular the covenants and agreements aforesaid, the said par-

*Answer of Added Defendant.*

ties do bind themselves and their respective heirs, executors and administrators.

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

10

(signed) HENRY BYRNE (L. S.)

(signed) ANNA BYRNE (L. S.)

(signed) GEORGE GROSSMAN (L. S.)

Signed, Sealed and Delivered  
in the presence of  
(Signed) HERMAN BARDACK

**Answer of Added Defendant.**

NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

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|  |   |
|--|---|
| <p>GEORGE GROSSMAN,<br/><i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>HENRY BYRNE, ANNA BYRNE and<br/>HERMAN BARDACK,<br/><i>Defendants.</i></p> | <p>Action at Law.<br/>Answer of<br/>Herman Bardack<br/>to Counterclaim.</p> |
|--|---|

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The defendant Herman Bardack, answering the counterclaim filed herein, says:

1. Defendant Herman Bardack denies the allegations contained in paragraph 1 of the Counterclaim, excepting that this defendant admits that the plaintiff, George Grossman and defendants Henry Byrne and Anna Byrne executed the written contract, a copy of which is annexed to the counterclaim herein.

40

*Answer of Added Defendant.*

10 2. Herman Bardack denies the allegations contained in paragraph 2 of the counterclaim, and he expressly states that he was in nowise the principal in said transaction, and that George Grossman did not act as agent, and was in no manner authorized to act for him.

3. Paragraph 3 of the counterclaim is denied.

4. Paragraph 4 of the counterclaim is denied.

5. Paragraph 5 of the counterclaim is denied.

6. Paragraph 6 of the counterclaim is denied.

7. Paragraph 7 of the counterclaim is denied.

FIRST SEPARATE DEFENSE TO COUNTERCLAIM.

20 The defendant Herman Bardack will set up in bar of the action contained in the counterclaim, the laws and statutes of New Jersey, more particularly the section commonly termed "The Statute of Frauds," wherein and whereby it is provided that no suit shall be brought upon any contract for the sale of lands, unless the same is in writing and signed by the party to be charged thereby, and the fact is that the contract annexed to the counterclaim is not signed by the defendant Herman  
30 Bardack herein.

SECOND SEPARATE DEFENSE TO COUNTERCLAIM.

The defendant Herman Bardack reserves the right to strike out the counterclaim herein filed on the ground that the same discloses no cause of action.

THEO. S. CHAZIN,  
Attorney of Defendant Herman Bardack.

**Notice of Motion to Strike Out.**

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

|  |   |                                 |
|--|---|---------------------------------|
| <p style="text-align: center;">GEORGE GROSSMAN,<br/><i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">HENRY BYRNE, ANNA BYRNE and<br/>HERMAN BARDACK,<br/><i>Defendants.</i></p> | } | <p>10</p> <p>Action at Law.</p> |
|--|---|---------------------------------|

To

RICHARD DOHERTY, Esq.,  
Attorney of Defendants Henry Bryne  
and Anna Bryne. 20

THEODORE S. CHAZIN, Esq.,  
Attorney of Defendant Herman Bardack.

Please take notice that on Friday, the 17th day of February, 1928, at two o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, we shall move before the Hon. Henry E. Ackerson, Jr., Judge of the Hudson County Circuit Court, Supreme Court Commissioner, at the Court House in the City of Jersey City, for an order striking out the answer and counterclaim filed herein on behalf of the defendants Henry Byrne and Anna Byrne, upon the grounds that the said answer is sham, frivolous and filed merely for the purpose of delay, and that the defenses therein contained constitute no defense to this action. 30

And take further notice that we shall use at

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*Affidavits for Plaintiff.*

the argument of said motion, affidavits, copies of which are hereto annexed and furnished you.

10 And take further notice that we shall likewise apply for summary judgment in favor of the plaintiff George Grossman, and against the defendants Henry Byrne and Anna Byrne for the sum of Eight Hundred (\$800.00) Dollars.

Dated February 9, 1928.

Yours, &c.,

GROSS & GROSS,  
Attorneys of Plaintiff.

**Affidavits for Plaintiff.**

20 NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

GEORGE GROSSMAN,  
*Plaintiff,*

*v.*

HENRY BYRNE, ANNA BYRNE and  
HERMAN BARDACK,  
*Defendants.*

Action  
at Law.

30

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

GEORGE GROSSMAN, of full age, being duly sworn, on his oath deposes and says:

I am the plaintiff in the above entitled action.

40 On May 5, 1927, the defendants Henry Byrne and Anna Byrne, his wife, entered into a contract with me wherein and whereby the said defendants

*Affidavits for Plaintiff.*

agreed to convey to me, on the 1st day of July, 1927, certain lands and premises described in said contract, free from all encumbrances, for the consideration or sum of \$25,500.00, a copy of said contract being annexed to this affidavit and made part hereof.

10

At the time of the execution and delivery of the contract aforesaid I paid to said defendants the sum of \$500 on account of the purchase price of said lands and premises, the receipt of which was duly acknowledged by the defendants Henry Byrne and Anna Byrne, his wife. The contract aforesaid contained a clause as follows:

“The party of the first part agrees to convey a marketable title, the test of marketability to be the furnishing of a title policy without exceptions by the New Jersey Title Guarantee & Trust Company”

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(the party of the first part in said contract being the defendants Henry Byrne and Anna Byrne herein).

The said defendants were not on the 1st day of July, 1927, or at any time prior to or since said date, ready, able or willing to convey to me the lands and premises in said contract by them agreed to be conveyed, free from all encumbrances, and in such manner as to furnish a title policy without exceptions by the New Jersey Title Guarantee & Trust Company, but, on the contrary, there were various encroachments existing as to the buildings upon the lands and premises described in the contract; amongst others, the premises 292 Virginia Avenue encroached upon the lands on the west; premises 294 Virginia Avenue encroached upon the lands on the east, etc., etc., all of which appears

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40

*Affidavits for Plaintiff.*

10 from copy of survey hereto annexed and made part hereof, and the said New Jersey Title Guarantee & Trust Company was not willing to and is still not willing to grant a title policy free and clear of exceptions, but is desirous of excepting mislo-

cations and encroachments as shown by survey.  
I have been at all times ready, able and willing to perform the said contract in all things on my part, and have performed all of the conditions thereof on my part to be done and performed, but the said defendants Henry Byrne and Anna Byrne, his wife, have defaulted therein in the particulars above mentioned.

20 I have demanded of the defendants that they return the aforesaid sum of money to me, but the defendants, although they have frequently promised to do so, have not as yet returned the same to me.

Search fees incurred by me total \$300.00 as appears from the affidavit of Leo Blumberg hereto annexed.

30 I have read the answer filed by the defendants Henry Byrne and Anna Byrne, and I verily believe that the same is sham and filed merely for the purpose of delay. It is untrue as stated in said answer that Mr. Herman Bardack was the principal in the matter, and that I acted as agent. I was the principal in the contract.

40 It is untrue as stated in paragraph 4 of the answer that after the making of the contract the said contract was by mutual agreement of myself and the defendants Henry Byrne and Anna Byrne so modified as to eliminate therefrom the provision that the test of marketability of the title was to be the furnishing of a title policy without exceptions

*Affidavits for Plaintiff.*

by the New Jersey Title Guarantee & Trust Company. The fact is that I have not spoken to Mr. Henry Byrne since the making of the contract. Furthermore, I am advised by my attorneys that this constitutes neither a legal nor a meritorious defense. I have always insisted upon the contract being performed as drawn. 10

It is also untrue as stated in the answer under the caption "Second Separate Defense to Complaint" that I entered in and upon the lands and premises in the contract mentioned on July 1, 1927 and had possession of the same, and that I excluded the defendants Henry Byrne and Anna Byrne from the possession thereof. It is untrue that I took any of the rents, issues and profits to my own use. The fact is that I have never collected a penny of rents of the premises, but to the best of my knowledge and belief the defendants Henry Byrne and Anna Byrne have always been in possession thereof, and have themselves collected the rents, issues and profits. 20

It is untrue as stated in the answer under the caption "Third Separate Defense to the Complaint" that I, well knowing that the said New Jersey Title Guarantee & Trust Company was not willing to issue a title policy free and clear of exceptions, was, nevertheless, desirous of waiving the clause in the contract providing that the test of marketability of the title was to be the furnishing of a title policy free and clear of exceptions. This idea never occurred to me, as all matters pertaining to the closing of the title and examination of the title 30

*Affidavits for Plaintiff.*

were left entirely to the New Jersey Title Guarantee & Trust Company and to my attorneys.

GEORGE GROSSMAN.

10 Sworn and subscribed to before me }  
this 31st day of January, 1928. }

THEODORE H. MATTIL,  
Attorney at Law,  
Of New Jersey.

**Affidavits for Plaintiff.**

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

20 GEORGE GROSSMAN,  
*Plaintiff,*  
  
v.  
  
HENRY BYRNE, ANNA BYRNE and  
HERMAN BARDACK,  
*Defendants.* } Action at Law

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

HERMAN BARDACK of full age being duly sworn,  
on his oath deposes and says:

I was present at the time the contract, a copy  
of which is annexed to this affidavit, was exe-  
cuted. I witnessed the execution of the said con-  
tract. My firm was the broker which negotiated  
the contract aforesaid.

40 I have read the answer and counterclaim filed  
in this cause, and I verily believe that the same is

*Affidavits for Plaintiff.*

sham and filed merely for the purposes of delay. The allegations contained in said answer and counterclaim to the effect that I had anything to do with the contract as a principal is absolutely untrue. I was not the principal in the matter and had acted in the negotiations in no other capacity than as broker. 10

It is untrue that I collected the rents or that I entered into possession of the premises.

It is untrue that I in any wise entered into an agreement with the defendants to eliminate from the contract the clause to the effect that the test of marketability was to be the furnishing of a title policy without exceptions by the New Jersey Title Guarantee & Trust Company. 20

HERMAN BARDACK.

Sworn and subscribed to before me }  
this 13th day of January, 1928. }

THEODORE H. MATTIL,  
Attorney at Law  
of New Jersey.

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**Affidavits for Plaintiff.**

NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

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GEORGE GROSSMAN,  
*Plaintiff,*

*v.*

HENRY BYRNE, ANNA BYRNE and  
HERMAN BARDACK,  
*Defendants.*

Action at Law.  
Affidavit of  
Surveyor.

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

20

CLARENCE L. DUNHAM, of full age, being duly sworn, on his oath deposes and says:

I am connected with the firm of Frederick Dunham and I personally made the survey of premises described as follows:

30

ALL those certain lots, tracts or parcels of land and premises, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, which are known and designated as lots numbered twenty-two (22) and twenty-three (23) in Block No. 1764/622 fronting on Virginia Avenue, as laid down and shown on an Assessment Map accompanying Report numbered one hundred and one (101), made by the Commissioners of Adjustment appointed for Jersey City, under the provisions of Chapter CXII of the laws of 1886 and the supplements thereto and filed with their

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*Affidavits for Plaintiff.*

said report in the Office of the Clerk of the County of Hudson, a certified copy of which report and map was transmitted to and filed with the City Collector of Jersey City.

ALSO all those certain lots, tracts or parcels of land and premises, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, which are known and designated as lots numbered twenty-seven (27) and twenty-eight (28), in Block No. 622 fronting on Virginia Avenue as laid down and shown on an Assessment Map accompanying Report numbered sixty-nine (69) made by the Commissioners of Adjustment appointed for Jersey City, under the provisions of Chapter CXII of the laws of 1886 and the supplements thereto, and filed with their said report in the office of the Clerk of the County of Hudson, a certified copy of which report and map was transmitted to and filed with the City Collector of Jersey City.

A copy of said survey, which shows conditions as I found them, is annexed to this affidavit and made part hereof. The survey was made by me from the description furnished me by the Title Company as above set forth. The survey was made from proper beginning points, and is entirely accurate.

Various encroachments are disclosed by the survey, which need not be referred to in this affidavit, as they can be gathered from an inspection of the copy of the survey annexed to this affidavit.

My experience in surveying in Jersey City has been over a period of years numbering 15.

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*Affidavits for Plaintiff.*

The charge for our survey was \$70.00, which is a reasonable charge.

CLARENCE L. DUNHAM.

Sworn and subscribed to before me }  
this 26th day of January, 1928. }

10

LEO BLUMBERG,  
Master in Chancery  
of N. J.

**Affidavits for Plaintiff.**

NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

20

GEORGE GROSSMAN,  
*Plaintiff,*

*v.*

HENRY BYRNE, ANNA BYRNE and  
HERMAN BARDACK,  
*Defendants.*

Action at Law.

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

LEO BLUMBERG of full age being duly sworn, on his oath deposes and says:

I am an attorney and counsellor at law of the State of New Jersey, and a member of the firm of Gross & Gross, attorneys of the plaintiff herein.

I drew the contract for the parties herein. I am also in charge of this litigation for Mr. George Grossman.

40

Mr. George Grossman duly rescinded the contract because of the failure of the defendants

*Affidavits for Plaintiff.*

Henry Byrne and Anna Byrne to comply with the terms of the contract, more particularly the clause which required the Title Company to issue a title policy free and clear of all exceptions. The Title Company would not issue such a policy, and is still unwilling to issue such a policy.

10

The charge made for search fees herein totals \$300.00, which in my opinion is a reasonable charge, and includes \$208.00 actual disbursements to the Title Company and to the surveyor, and which includes also our charge for services herein in examining reports, surveys and other matters preliminary to the closing of the title.

.....

20

Sworn and subscribed to before me }  
this 9th day of February, 1928. }

WM. F. LUDWIG,  
Master in Chancery  
of New Jersey.

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**Affidavits for Plaintiff.**

NEW JERSEY SUPREME COURT,  
HUDSON COUNTY.

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GEORGE GROSSMAN,  
*Plaintiff,*

*v.*

HENRY BYRNE, ANNA BYRNE, and  
HERMAN BARDACK,  
*Defendants.*

Action at Law.

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

HOWARD R. CRUSE, of full age, being duly sworn,  
on his oath deposes and says:

I am the Title Officer of the New Jersey Title  
Guarantee & Trust Company.

There was prepared under my supervision a re-  
port of title addressed to Mr. George Grossman,  
covering premises described as follows:

30

ALL those certain lots, tracts or parcels of  
land and premises, situate, lying and being  
in the City of Jersey City, in the County of  
Hudson and State of New Jersey, which are  
known and designated as lots numbered  
twenty-two (22) and twenty-three (23), in  
Block No. 1764/622 fronting on Virginia Ave-  
nue, as laid down and shown on an Assess-  
ment Map accompanying Report numbered  
one hundred and one (101), made by the  
Commissioners of Adjustment appointed for

40

*Affidavits for Plaintiff.*

Jersey City, under the provisions of Chapter CX11 of the laws of 1886 and the supplements thereto, and filed with their said report in the office of the Clerk of the County of Hudson, a certified copy of which report and map was transmitted to and filed with the City Collector of Jersey City. 10

ALSO all those certain lots, tracts or parcels of land and premises, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, which are known and designated as lots numbered twenty-seven (27) and twenty-eight (28) in Block No. 622 fronting on Virginia Avenue, as laid down and shown on an Assessment Map accompanying Report numbered sixty-nine (69), made by the Commissioners of Adjustment appointed for Jersey City, under the provisions of Chapter CX11 of the laws of 1886 and the supplements thereto, and filed with their said report in the office of the Clerk of the County of Hudson, a certified copy of which report and map was transmitted to and filed with the City Collector of Jersey City. 20 30

Said Report is numbered G-29702 and is dated August 19, 1927, and is entitled "Report of Title to Premises known as Lots 22, 23, 27 and 28 in Block 1764, Virginia Avenue, Jersey City, N. J." A copy of said report is annexed to this affidavit and made part hereof.

There is an item in said Report to the following effect:

"The premises are subject to the following 40

*Plaintiff's Exhibits.*

encumbrances and claims which will be excepted in the Guaranty unless removed:  
 “\* \* \* Survey dated July 21, 1927, shows mislocations and encroachments.’”

10 The position of my company is that the title policy to be issued by this company in this matter will not be free and clear of exceptions, but will contain the exception as to survey, amongst others. That is still our position, and unless proof is submitted that these mislocations and encroachments have been removed, our title policy will necessarily contain this exception.

20 The bill rendered by my company for its services herein totals \$208.00, which includes \$138 for examination and report of title and \$70.00 for survey. This bill is reasonable for the services in making the search and survey.

HOWARD R. CRUSE.

Sworn and subscribed to before me }  
 this 31st day of January, 1928. }

JOHN C. INWIGH,  
 M. C. C. of N. J.

30 **Plaintiff's Exhibit.**

G. 29702.

**REPORT OF TITLE.**

THE NEW JERSEY TITLE GUARANTEE AND TRUST CO.,  
 83 Montgomery St., Jersey City.

8 A. M., August 19th, 1927.

Mr. George Grossman,

40 Referring to conveyance of Premises lots 22, 23, 27 and 28, Block 1764, Virginia Avenue, Jersey City, N. J. about to be made by Henry Byrne and wife

*Plaintiff's Exhibits.*

to George Grossman, we find Title in fee in Henry Byrne, by deed dated June 27, 1900, recorded in Book 770, page 267.

The premises are subject to the following incumbrances and claims, which will be excepted in the Guaranty unless removed:

10

Mortgages—None.

Inspection—Rights of tenants in possession.

Survey—Dated July 21, 1927, shows mislocations and encroachments.

Taxes—1927, balance \$464.74.

Assessments—None.

Water rents—Non-placement of meter, \$300.00.

Tax Sales—None adverse to title.

Judgments and other claims—July 14, 1927, Trenton—none. County—none. Easement of sewer, pipe or drain, if any. Contract of sale between Henry Byrne and wife and Englewood Development Co., dated June 17, 1926, recorded in Book 1613, page 258.

20

THE NEW JERSEY TITLE GUARANTEE  
AND TRUST COMPANY,  
By HOWARD R. CRUSE,  
Title Officer.

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**Plaintiff's Exhibit.**

ARTICLES OF AGREEMENT made the fifth day of May, Nineteen Hundred and Twenty-seven, between Henry Byrne and Anna Byrne, his wife, of the City of Jersey City, County of Hudson and State of New Jersey, party of the first part; and George Grossman, of the City of Jersey City, in the County of Hudson and State of New Jersey, party of the second part.

40

*Plaintiff's Exhibits.*

10 WITNESSETH, that the said party of the first part, for and in consideration of the sum of Twenty-five Thousand Five Hundred (\$25,500.00) Dollars, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agree-  
20 ments 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, his heirs and assigns, by Deed of Bargain and Sale, free from all encumbrance on or before the first day of July, next ensuing the date hereof, all those lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, known as lots twenty-two (22) and twenty-three (23) and twenty-seven (27) and twenty-eight (28) in City Block 1764; consisting of six houses known by street numbers 292-292a-294-302-302a and 306 Virginia Avenue, Jersey City, N. J.; being premises described in two deeds to Henry Byrne herein, and which premises shall be described by metes and bounds in the conveyance to be made to  
30 the party of the second part.

And the said George Grossman for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he, 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 sum of Twenty-five Thousand Five Hundred (\$25,500.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:  
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*Plaintiff's Exhibits.*

|  |            |    |
|--|------------|----|
| Cash deposit on execution of this contract receipt whereof is acknowledged by the party of the first part, the sum of  | 500.00     |    |
| By taking the property subject to six separate mortgages of the principal sum of Thirty-eight Hundred Fifty (\$3850.) Dollars each, each mortgage to be a lien on one of the houses and lot hereinbefore mentioned and to be for a period of ten years with installments of One Hundred (\$100.) Dollars, payable on each mortgage annually for the first five years of said mortgage; said mortgage further to contain a clause that the mortgagor may pay off said mortgage at any time before maturity. | 23100.00   | 10 |
| Balance in cash at closing of title  | 1900.00    |    |
|  | <hr/>      |    |
|  | \$25500.00 |    |

The party of the first part agrees to convey a marketable title, the test of marketability to be the furnishing of a title policy without exceptions by the N. J. Title Guarantee & Trust Co. 30

Taxes, interest, rents and fire insurance premiums to be adjusted and apportioned as of the date of closing of title.

Risk of loss by fire or otherwise pending closing of title, to be borne by the party of the first part.

And it is further agreed by the parties to these presents that the said party of the second part, his heirs and assigns, may enter into and upon the said lands and premises on the first day of July next ensuing the date hereof, and from thence 40

*Plaintiff's Exhibits.*

take the rents, issues and profits to his and their use.

10 And it is further agreed by the parties hereto that the said deed shall be delivered and received at the offices of Gross & Gross, 15 Exchange Place, Jersey City, N. J., between the hours of ten in the forenoon and four o'clock in the afternoon on the said first day of July next ensuing the date hereof.

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

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

HENRY BYRNE, (L. S.)

ANNA BYRNE, (L. S.)

GEORGE GROSSMAN, (L. S.)

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

HERMAN BARDACK.

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

Be it remembered that on this fifth day of May, in the year of our Lord One Thousand Nine Hundred and Twenty-seven, before me, the subscriber, a Notary Public, personally appeared Henry Byrne and Anna Byrne, his wife, who I am satisfied are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged, that they  
40 signed, sealed and delivered the same as their vol-

(Page) 36A

MALLORY AVE.

MALLORY

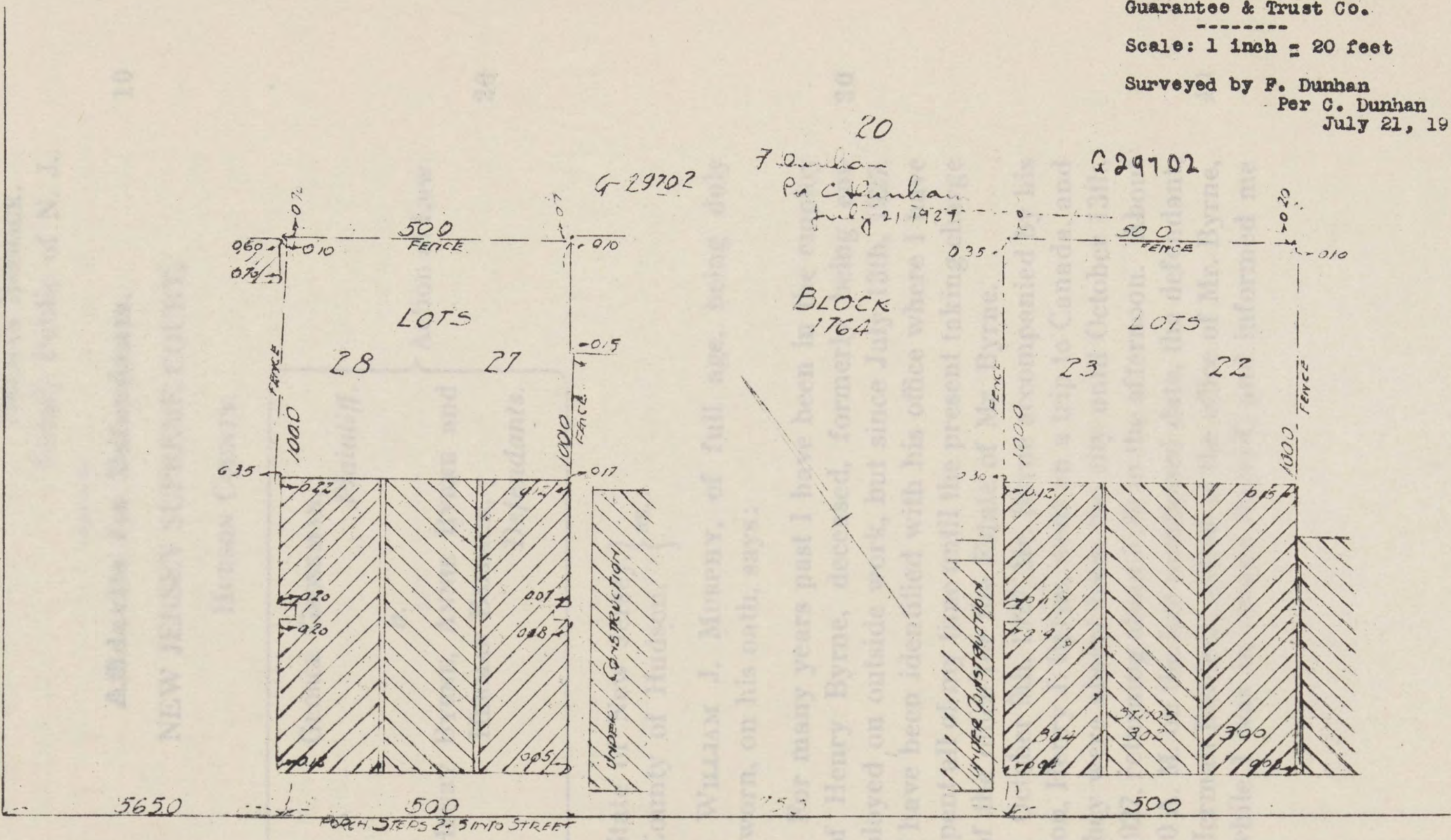
VIRGINIA

AVE.

Survey  
At Jersey City, N. J.  
for  
The New Jersey Title  
Guarantee & Trust Co.

Scale: 1 inch = 20 feet

Surveyed by F. Dunhan  
Per C. Dunhan  
July 21, 1927.



20  
F. Dunhan  
Per C. Dunhan  
July 21, 1927.

G 29702

G 29702

BLOCK 1764

LOTS

28 27

23 22

UNDER CONSTRUCTION

UNDER CONSTRUCTION

5650  
500  
PORCH STEPS 2' 5\"/>

500

2VA

Plaintiff's Exhibits

take the rents, issues and profits to his and their use

10 And it is further agreed by the parties hereto that the said deed shall be delivered and received at the offices of Gross & Gross, 15 Exchange Place, Jersey City, N. J., between the hours of ten in the forenoon and four o'clock in the afternoon on the said first day of July, next ensuing the date hereof.

Also for the performance of all and singular the covenants and assents by the said parties do bind themselves and their respective heirs, executors and administrators.

20 In Witness Whereof the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

HENRY BYRNE  
ANNA BYRNE (L. S.)  
Gross & Gross (L. S.)

Signed, sealed and delivered in the presence of:

HERMAN BARDACK

State of New Jersey,  
County of Hudson,

Be it remembered that on this fifth day of May, in the year of our Lord One Thousand Nine Hundred and Twenty seven, before me, the undersigned, a Notary Public, personally appeared Henry Byrne and Anna Byrne, his wife, who I am satisfied are the grantors mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same of their vol-

Witness

2VA

Notary Public  
for C. D. Dunning  
207A St. 7088  
Gross & Gross  
15 Exchange Place  
Jersey City, N. J.  
5301107

*Affidavits for Defendants.*

untary act and deed, for the uses and purposes therein expressed.

HERMAN BARDACK,  
Notary Public of N. J.

**Affidavits for Defendants.**

10

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

GEORGE GROSSMAN,  
*Plaintiff,*

*v.*

HENRY BYRNE, ANNIE BYRNE and  
HERMAN BARDACK,  
*Defendants.*

Action at Law.

20

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

WILLIAM J. MURPHY, of full age, being duly sworn, on his oath, says:

For many years past I have been in the employ of Henry Byrne, deceased, formerly being employed on outside work, but since July 13th, 1927, I have been identified with his office where I have spent all of my time until the present taking charge of the office for the Estate of Mr. Byrne.

30

October 9th, 1927, Mr. Byrne accompanied by his son, Henry J. Byrne, went on a trip to Canada, and they were absent from the city until October 13th, 1927, returning about 3:30 in the afternoon. About 10 A. M. on the last mentioned date, the defendant, Herman Bardack, called at the office of Mr. Byrne, while I was in charge thereof, and informed me

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*Affidavits for Defendants.*

that the purpose of his visit was to state that the plaintiff, George Grossman, was willing at that particular moment to take title to the Virginia Avenue places involved in the present suit. He stated to me something about the parties then waiting at a bank in readiness to close the title. I explained to him that Messrs. Byrne were absent from town, and he left the office without intimating any other time when title could pass.

During the entire period of my office service, which led me into intimate contact with the business affairs of Mr. Byrne, there was no other occasion when any announcement was made of the willingness of Mr. Grossman to close the title.

WILLIAM J. MURPHY.

Sworn to and subscribed before me }  
this 4th day of June, 2928. }

MATILDA M. BRAUER,  
Notary Public  
of New Jersey.

**Affidavits for Defendants.**

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

|   |   |                                 |
|---|---|---------------------------------|
| <p>GEORGE GROSSMAN,<br/><i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>HENRY BYRNE, ANNIE BYRNE and<br/>HERMAN BARDACK,<br/><i>Defendants.</i></p> | } | <p>10</p> <p>Action at Law.</p> |
|---|---|---------------------------------|

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

HENRY J. BYRNE of full age, being duly sworn, on his oath, says: 20

I am the son of the above named Henry Byrne, who departed this life after the institution of the present action, leaving a last will and testament wherein I and the Lincoln Trust Company of New Jersey were appointed executors; said will has been duly probated; I and the corporate executor have duly qualified; the death of the said Henry Byrne, deceased, has been duly suggested on the record, and the court, by rule, has heretofore admitted myself and the said Lincoln Trust Company of New Jersey as party defendants in the place and stead of the said Henry Byrne, deceased. 30

I was his business associate in the conduct of his affairs, following no other pursuit; and, being in constant communication with him, was entirely familiar and in intimate touch with his business dealings, including the matter of his agreement 40

*Affidavits for Defendants.*

to convey to the above plaintiff the premises described in the plaintiff's affidavits on this motion, and the subsequent activities therein.

10 The contract called for the passing of title July 1st, 1927, and a few days before the latter date I called at the office of Gross & Gross, the purchaser's attorneys, to ascertain whether Mr. Grossman would be prepared to take title on the day specified. I was received by a stenographer in the employ of the plaintiff's attorneys to whom I identified myself and stated my desire to learn when the plaintiff would be ready to take title. No member of the firm was in the office, although the stenographer mentioned to me the name of the attorney who was handling the matter and told me that  
20 the latter would communicate with me when the plaintiff was ready to take the deed.

On July 1st, 1927, the plaintiff was not ready and willing to take title. He did not order the search to be made by the Title Guarantee & Trust Co. until some time thereafter, and, as I verily believe, about July 15th. The search and report of title so ordered were not completed until August 19th, 1927, 8 A. M., and from that time until about November 1st, 1927, the plaintiff expressed no dissatisfaction with the contract, nor did he complain of the refusal of the Title Company to issue a certificate free from exceptions, nor did he take any step towards the rescission of the contract upon that, or any other ground. On the contrary, around  
30 October 1st, 1927, to the best of my recollection the plaintiff, George Grossman and the defendant, Herman Bardack, placed upon each of the two groups of houses signs announcing that they were for sale through themselves, the immediate effect of which was to convey to the tenants occupying  
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*Affidavits for Defendants.*

the respective premises that the ownership was to pass into new and speculative hands, and thereupon seven or eight tenants were induced to remove therefrom.

On October 9th, 1927, my father and I went on a trip to Canada and returned to Jersey City about 3:30 in the afternoon of October 13th, 1927. As set forth in the affidavit of William J. Murphy, during our absence from town, Herman Bardack, representing the plaintiff, appeared at our office about 10 A. M., October 13th, 1927, and stated to Mr. Murphy that Mr. Grossman was ready to pass title that same hour. Upon being informed of our absence, he left the office without suggesting any other time when title could be passed. On our return on the afternoon of October 13th we awaited a further announcement of the plaintiff's willingness to take title, but none was made, and my next interest in the matter was stimulated by reading in the Jersey Journal, a newspaper published at Jersey City in its edition of October 15th, 1927, an advertisement, a copy of which is annexed hereto, that the premises described in the contract would be sold at public auction on Monday, October 17th at 2 P. M. by Hudson Auctioneers, employed by plaintiff. As part of the same advertisement was an announcement that at 3:30 P. M. on the same day 2 two-family houses located at 226-228 Princeton Avenue, Jersey City, and also controlled by the plaintiff would likewise be sold.

The Princeton Avenue premises were owned by the plaintiff, George Grossman, about the time of making the contract with us, his deed having been recorded May 23, 1927. By his deed recorded August 31st, 1927, he conveyed the same to Sidney S. Reiss, taking back a mortgage, and by deed re-

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*Affidavits for Defendants.*

corded December 29th, 1927, Reiss reconveyed the same premises to Grossman.

10 The auction advertised as above set forth was futile, because of the stormy weather that prevailed, and I aver that it was only because of the plaintiff's inability to dispose of the premises through such auction that he eventually complained of the refusal of the Title Company to issue a certificate without exceptions, and that prior to November 28th, 1927, the plaintiff was entirely willing to, and did, waive the said provision in the contract. No direct notification was given to my father that the contract was rescinded on account of the refusal of the Title Company to so certify. November 28th, or thereabouts, he received from Gross & Gross, the plaintiff's attorneys, 20 a letter, of which the following is a copy, which complains merely of the encroachments and was silent on the matter of the Title Company's refusal.

I have seen the alleged survey prepared by Clarence L. Dunhan, and I doubt the accuracy thereof, and aver that the same is not to be taken as wholly reliable until fully validated as to the beginning points to which Mr. Dunhan refers in his affidavit. 30 The survey discloses that the width of the houses are substantially coincident with the lines of the lots, and that at no time was the excess more than an insignificant quantity, the greatest being at the rear of the westerly group of houses where the differential is 1/10th of a foot. The greatest differential on the other group is at the rear where it constitutes 3/100ths of a foot. Should the survey of Mr. Dunhan have proceeded on any inaccuracy as to his starting points or measurements the mis- 40

*Defendants' Exhibit.*

locations reported by him would have easily been indicated although erroneous.

HENRY J. BYRNE.

Sworn to and subscribed before me }  
this 4th day of June, 1928. } 10

MATILDA M. BAUER,  
Notary Public  
of New Jersey.

**Defendants' Exhibit.**

HUDSON AUCTIONEERS

76 Montgomery St., Jersey City, N. J.

Telephones Delaware 6600, 6601, 5737. 20

AUCTION

At Premises

Monday, Oct. 17, 1927, 2 P. M.

6 Two Family Dwellings  
292-292A-294-300-302-304 Virginia Avenue,  
Jersey City

These properties contain 5 and 6 room apart-  
ments each with all cold water improvements ex- 30  
cepting heat. They will be sold separate and also  
as one parcel. Attend this sale and make your  
own prices—sacrifice prices—builders' terms, if  
necessary. Excellent terms to individual buyers.

Also at Premises—Same Day—3:30 P. M.

2 Two-Family Houses  
226-228 Princeton Ave., J. C.

Newly built houses consisting of 5 and 6 room  
apartments each, on plots 25 x 100 feet, slate 40

*Defendants' Exhibit.*

10 roofs, driveways, sun parlors, steam heat, gas and electric and all other modern improvements. The terms on these houses are very attractive for the small pocketbook. Please call auctioneers for private inspection prior to the sale. Cash deposits required at time of sale. Watch the vehicular tunnel boom. Jersey City—Buy in Hudson County. SALES RAIN OR SHINE.

---

GROSS & GROSS

Counselors at Law

15 Exchange Place

Jersey City, N. J.,  
Nov. 28, 1927.

20 Henry Byrne, Esq.,  
548 Montgomery St.,  
City.

Dear Sir:

Mr. George Grossman has retained us to institute suit against you for the recovery of \$500.00 deposit and \$200.00 search fee in reference to recent contract for the purchase of lots 22, 23, 27 and 28 in Block 1764 on Virginia Avenue, Jersey City, N. J.

30 As you know, there are encroachments on this property and for that reason Mr. Grossman rejected your title.

We expect to have the \$700.00 in our office this week, otherwise suit will be instituted.

Very truly yours,

GROSS & GROSS.

LB\*AG

**Suggestion of Death of Henry Byrne.**

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

|  |   |                |
|--|---|----------------|
| GEORGE GROSSMAN,<br><i>Plaintiff,</i>  | } | 10             |
| <i>v.</i>  |   |                |
| HENRY BYRNE, ANNA BYRNE and<br>HERMAN BARDACK (added),<br><i>Defendants.</i> | } | Action at Law. |

It is hereby suggested, and the court is here given to be informed that the above named defendant, Henry Byrne, subsequent to the commencement of the above entitled action, and to the filing of his counterclaim against the said George Grossman and Herman Bardack, departed this life February 25th, 1928, during the pendency of the above entitled action, and before the entry of any judgment therein. 20

And the court is further given to be informed that on the 23rd day of March, 1928, the last will and testament of the said Henry Byrne was duly admitted to probate by the Surrogate of the County of Hudson, and thereupon issued letters testamentary to Henry J. Byrne and Lincoln Trust Company of New Jersey, the executors thereof, and 30

*Rule Substituting Executors as Defendants.*

who as such executors succeed the said Henry Byrne as defendant in respect of said action.

Dated March 28, 1928.

RICHARD DOHERTY,  
Attorney of succeeding Defendants.

10

Let the above be entered in the minutes.

FRANK L. CLEARY,  
Supreme Court Commissioner.

Actually entered 1928 on motion of Richard Doherty, attorney of succeeding defendants.

**Rule Substituting Executors as Defendants.**

NEW JERSEY SUPREME COURT,

20

HUDSON COUNTY.

GEORGE GROSSMAN,  
*Plaintiff,*

*v.*

HENRY BYRNE, ANNA BYRNE and  
HERMAN BARDACK (added),  
*Defendants.*

Action at Law.

30

The above named defendant, Henry Byrne, since the commencement of the above entitled suit, and subsequent to the filing by him of the counterclaim, having departed this life February 25th, 1928; and Henry J. Byrne and Lincoln Trust Company of New Jersey having been appointed executors of the last will and testament of the said Henry Byrne, which was duly admitted to probate by the surro-

40

*Order Striking Out Answer.*

gate of the County of Hudson, who thereupon issued letters testamentary to the said Henry J. Byrne and Lincoln Trust Company of New Jersey; and all the parties consenting hereto, on motion of Richard Doherty, attorney of the said Henry J. Byrne and Lincoln Trust Company of New Jersey, executors, it is on this 28th day of March, 1928 10

ORDERED, that the said Henry J. Byrne and Lincoln Trust Company of New Jersey, executors of the last will and testament of Henry Byrne, deceased, be substituted in his place and stead in respect of said action.

FRANK L. CLEARY,  
Supreme Court Commissioner.

We consent to the making of the foregoing order. 20

GROSS & GROSS,  
Attorneys of Plaintiff.

THEO. S. CHAZIN,  
Attorney of Defendant,  
Herman Bardack.

**Order Striking Out Answer.**

NEW JERSEY SUPREME COURT. 30

GEORGE GROSSMAN,  
*Plaintiff,*

*v.*

HENRY BYRNE, *et als.,*  
*Defendants.*

Action at Law.

Summons and complaint having been duly issued in this cause, and the defendants Henry 40

*Order Striking Out Answer.*

10 Byrne and Anna Byrne having filed an answer and counterclaim herein, and notice of motion having been made to strike out said answer and counterclaim on the ground that the said answer and counterclaim are sham and frivolous, and filed  
20 merely for the purpose of delay; and the Court having considered the affidavits presented by the plaintiff and by the defendants; and the Court having considered the arguments of Gross & Gross, as attorneys for the plaintiff, and of Richard Doherty, as attorney for the defendants Henry Byrne and Anna Byrne; and it appearing that the defendants have not presented facts sufficient to entitle them to defend; and it appearing that the plaintiff is entitled to the relief prayed for in his notice of motion; it is, therefore, on this 24th day of July, 1928, on motion of Gross & Gross, attorneys of the plaintiff,

ORDERED, that the answer and counterclaim filed by the defendants Henry Byrne and Anna Byrne be and hereby are stricken out, and for nothing holden. And it is further

30 ORDERED, that the plaintiff herein may proceed in this action as if no answer or counterclaim had been filed.

FRANK L. CLEARY,  
Supreme Court Commissioner.

**Rule for Judgment.**

## NEW JERSEY SUPREME COURT.

GEORGE GROSSMAN,  
*Plaintiff,*

*v.*

HENRY J. BYRNE and the LINCOLN  
TRUST COMPANY OF N. J., execu-  
tors of the estate of Henry  
Byrne; and ANNIE (or Anna)  
BYRNE,

*Defendants.*

10

} Action at Law.

The answer filed by the defendants in the above  
stated cause having been ordered stricken out by  
the Court,

20

It is ordered that judgment final be and hereby  
is entered in favor of plaintiff and against the de-  
fendants for the sum of eight hundred and thirty-  
six dollars and twenty-five cents, besides costs to  
be taxed.

Entered July 27, 1928.

On motion of

GROSS & GROSS, Attys.

30

|         |          |
|---------|----------|
| Damages | \$836.25 |
| Costs   | 68.78    |
|         | <hr/>    |
|         | \$905.03 |

40



## New Jersey Court of Errors and Appeals

GEORGE GROSSMAN,  
*Plaintiff-Appellee,*

*v.*

LINCOLN TRUST COMPANY OF NEW  
JERSEY and HENRY J. BYRNE,  
Executors of Henry Byrne,  
deceased; ANNA BYRNE,  
*Defendants-Appellants.*

On Appeal from  
Supreme Court.

### BRIEF FOR APPELLANTS.

#### Facts.

May 5th, 1927, the original defendant, Henry Byrne, who died during the pendency of the suit, entered into an agreement to convey to the plaintiff, George Grossman, two parcels of land in Jersey City located on the same city block, but separated by a piece of intervening property. The contract called for a bargain and sale deed free and clear from encumbrances, and the purchase price was \$25,500.00, the bulk of which was to be represented by 6 separate mortgages. Title was to pass July 1st, and it was provided that on such date the vendee might enter into possession and take the rents, issues and profits. The agreement contained but one unusual clause, which has become the crux of the present litigation:

“The party of the first part agrees to convey a marketable title, the test of marketability to be the furnishing of a title policy with-

out exceptions by the New Jersey Title Guarantee & Trust Co." (Articles of Agreement, p. 14).

The fee was in Henry Byrne alone, and the defendant, Anna Byrne, had only a right of dower (p. 15, line 10). The agreement stressed July 1st as the law date, and it appears in three places in the contract (p. 14, line 37; p. 16, line 28 and line 38).

A few days before July 1st the vendor sent his son to the office of the vendee's attorneys to ascertain if they would be prepared to take title on the date stipulated (p. 40, line 10). The messenger was informed that the attorneys would communicate with him when ready to pass title (p. 40, line 21). Although the contract afforded the vendee eight weeks in which to have the title examined, his course in reference to procuring same was such that the survey was not made until July 21st (p. 36-a) and the report of title was not prepared until August 19th (p. 40, line 27). No communication had taken place between the vendor and vendee whereby the time for taking title was extended (p. 23, line 5). Upon receipt of the report of title (p. 32), which showed that the title company would issue a policy only with exceptions as to certain alleged encroachments shown by the survey of July 21st, the vendee abstained from making any objections to the vendor based thereon (p. 40, line 32); on the contrary, about October 1st following he entered into possession of the premises at least to the extent of placing thereon signs advertising the same for sale through himself (p. 40, line 38), and on October 13th, while the vendor was on a visit to Canada, he sent Mr. Bardack, the agent, who ostensibly negotiated the sale, to the office of the vendor where Mr. Bardack told the person in charge that the vendee was willing and prepared to take a deed that day (p. 41, line 13).

The offer was not renewed after the vendor's return, but two days thereafter the vendee inserted in a newspaper the advertisement of an auction sale, to be held October 17th, of the premises contracted for, and likewise other property in which he had an interest (p. 41). The auction fell through for lack of bidders, and the matter once more lagged until November 28th when the vendee's attorneys, in a letter to the vendor, informed the latter that their client rejected the title for the reason that "there are encroachments on this property," and demanded the return of the deposit and the amount expended for search fees (p. 44). An action therefore was commenced December 12th.

The defendants answered that the feature of the contract providing that the test of marketability should be the furnishing of a title policy without exceptions was subsequently eliminated by mutual understanding, and in separate defenses set up, (1) the elimination of the clause, (2) that plaintiff was estopped, (3) that plaintiff had waived the clause providing a special test of marketability, (4) that defendants were at all times ready, able and willing to convey title marketable in fact and in law, and (5) that the plaintiff breached the contract through his default in paying the balance of the purchase price and refusing to execute and deliver the mortgages. A counterclaim was also made against the plaintiff (pp. 8-11), and in the alternative against Herman Bardack, an added defendant (pp. 11-14). The counterclaim against Bardack has not been disturbed by any ruling, and it is still pending in the Court below.

The plaintiff gave notice of motion to strike out the answer on the ground that the same was sham, frivolous, dilatory and insufficient (p. 19), and the

matter was heard on affidavits offered by both plaintiff and defendant. The ruling was that the answer should be struck out (p. 47), and summary judgment was entered in favor of the plaintiff (p. 49). From this ruling, dispositive of the merits of the case and upon which the rule for judgment was predicated, the defendants appeal (Grounds of Appeal, p. 2).

### ARGUMENT.

The representatives of Henry Byrne and Annie Byrne contend:

1. That the extra-legal standard of marketability, viz., the issuance of the title policy, was waived by the plaintiff, and this

- (a) by his failure to give prompt and reasonable notice of his rescission upon the attainment of the necessary knowledge,
- (b) by entering into possession after knowledge of the inavailability of such policy,
- (c) by his notification after the lapse of two months that he was ready to take title,
- (d) by his conduct in attempting to dispose of the premises,
- (e) by his assignment of a different ground for his rescission when the notice was ultimately given.

2. That with the parties' conventional criterion of marketability waived, the defendants' title was marketable, in fact, which question is determinable only by a jury.

3. That on the facts a jury might find that the plaintiff not only waived the policy test of marketability, but likewise waived his right to object to the mislocations, if such a right ever existed.

4. That having waived any provision or provi-

sions of the contract, the plaintiff was required to perform it as to the remaining terms, and his failure constituted a breach fairly justifying the counterclaim.

5. That the counterclaim is sustainable on its main demand for damages for loss of resale, and for the special damage of loss of rents and expenses of re-tenancy, if the defendant can show that the plaintiff's conduct in connection with his breach of the contract directly produced such special loss.

6. That to the extent that the plaintiff has not waived his right to recover, he has lost it by estoppel.

7. That plaintiff's intervening conduct barred his right to rescind.

#### POINT I.

**Questions of fact determinable only by a jury were presented as to whether (a) plaintiff waived a provision originally inserted in the contract for his exclusive benefit; (b) waived his right to rescind the contract and (c) was estopped to object to defect in the title.**

A vendee of property has the right to rescind because of the failure or inability of the vendor to comply with the terms of the contract, but such rescission must be made with reasonable promptness after the discovery of the ground upon which it proceeds.

*Schweitzer v. National House & Farm Ass'n.*, 93 N. J. Eq., 644.

The vendee, however, has full liberty of waiver and may waive the right to rescind; and such waiver may be evidenced by mere

delay, delay coupled with other acts, selling or offering property for sale, making lease, expressly recognizing contract, accepting deed with knowledge of defect in title and on various other grounds.

*Faulkner v. Wasserman*, 77 N. J. Eq. 537 (reported and annotated in 30 L. R. A., n. s. 872);

*Orange Soc. v. Konski*, 121 Atl. 448.

May waive his right to the evidence of title contracted for

*Turn Verein Eiche v. Kionka*, 255 Ill. 392, 99 N. E. 684 (reported and annotated in 43 L. R. A., n. s. 44).

May waive his objection to disclosed encroachments

*Randolph v. General Investor's Co.*, 2 N. J. Adv. Rep. 1158, 124 Atl. 765.

May waive objection to a substantial defect in the title affecting only a small portion thereof, and not depriving him of the enjoyment of the residue.

*Melick v. Cross*, 62 N. J. Eq. 544.

An exhaustive note on the subject of the vendee's waiver of vendor's obligation to furnish an abstract of title, amplifying the note under *Turn Verein Eiche v. Kionka. supra*, is found under

*Baker v. Howardson*, 52 A. L. R. 1496.

In this digestion of law is found a full consideration of the preclusive effect of accepting and retaining an abstract showing defects, the vendee's acquiescence in the vendor's attempts to cure the sale, his disposal or attempt to dispose of the property after discovery of the deficiency, and his laches in rescinding.

The vendee may likewise be *estopped* by his

own conduct from setting up the failure of the vendor to deliver according to the contract.

*Gold v. Schneider*, 130 Atl. 133;

*Field v. Perkins*, 92 N. J. Eq. 79;

*Barber v. Gunsburg*, 129 Atl. 477.

A stipulation in a contract for the sale of real estate that title shall be such as a designated Title Company will insure, while it is valid so long as the party for whose benefit it is made abides thereby, may be rendered ineffective by fraud, modification, waiver, or any other consideration whereby a voluntary agreement may be terminated or lost.

*Love v. Fetters*, 98 N. J. L. 784.

In the present instance the questions whether vendee waived his right to the policy; whether the surveyor's report was reliable; whether the mislocations were substantial; whether the title was marketable; whether vendee waived his objections to the encroachment; whether he lost his right to rescind by delay, attempted sale, or otherwise, as well as whether he is estopped by his conduct, are all questions of fact which must be left to a jury.

Whether the vendee waived his right to a title policy free from exceptions is the primary inquiry in the present case; if he did so, the question subsists whether the title available to him was (a) marketable, or (b) sufficient by reason of his further waiver of objections.

Where performance is pleaded in an action upon a contract containing conditions precedent to which there is a plea of general denial, the plaintiff may show a waiver of performance by the party entitled to insist upon such performance and proof of such waiver is tantamount to performance.

*Wilson v. Renner*, 85 N. J. L. 340.

“Marketable” title has been defined to mean a “saleable” title.

*Bier v. Walbaum*, 131 Atl. 888.

The burden of proving by a preponderance of evidence that there are encumbrances that render a title unmarketable is upon the plaintiff who seeks to recover his deposit.

*Bier v. Walbaum*, *supra*;

*Waterman v. Taub*, 127 Atl. 676, aff. 131 Atl. 924.

All encroachments are not defects in title and the judicial tendency to regard seriously slight mislocations seems to be limited to the cases in which the premises sold encroach upon sidewalks or other public places, which are liable at any time to be ordered removed because of the statute of limitations not running against the state.

*Vassar Holding Co. v. Wunsch*, 135 Atl. 88.

But even this rule was not invoked in an instance of a sidewalk encroachment of from 1 to 9 inches where the proof of the character of the encroachment was not satisfactory.

*Waterman v. Taub*, *supra*.

The power of the court to order summary judgment on a motion like the present has been fully determined.

*Grossman v. Brick*, 139 Atl. 490.

In the last case it seems that the present plaintiff with his present counsel, and making a claim almost identical with his present objection, moved to strike out the defendant's answer and asked for a summary judgment on his own affidavits. He appears to have prevailed in the Hudson County Common Pleas solely because his contention was not combated by counter-affidavits, although the latter situation was strenuously denied on the appeal.

The action of the Common Pleas was upheld on the theory that the facts upon which the motion was made were uncontested, and that there was no question whatever that the vendor's title was in fact and in law defective. This conclusion, coupled with semblance of the defendant having failed to file counter-affidavits disclosing that no substantial question of fact was involved, led exclusively to the affirmance.

It is suggested, obiter, that heedless judicial action in granting a motion for summary judgment, or striking out a counterclaim would be perilously near to a deprivation of the guarantee of a jury trial. In N. J. it is constitutionally proclaimed that it is inviolate. N. J. Const., Art. 1, Par. 7.

If the plaintiff, through his waiver or by his estoppel, conduced to an adjustment of contractual obligations different from those originally assented to he would be liable for a breach of his agreement so ultimately arrived at.

*Wilson v. Renner, supra.*

Upon the happening of such breach the defendant would be entitled to his action or counterclaim for damages, and the measure of the latter would be the loss of his bargain and such special damages as naturally, proximately and contemplatedly ensue from the fact and the method of the vendee's breach.

"By the general law of the land a vendee who has breached his contract, failed and refused to carry out its terms without any fault on the part of the vendor, who is willing to perform, is not entitled to come into court and receive back the proceeds of the purchase price that he has paid under the contract; but where the contract of purchase and sale has been rescinded the vendee may then recover whatever amount of money he has previously paid thereunder, and this notwithstanding the contract itself has a provision for the forfeiture of such sums; and that in this contin-

gency if the vendor wishes to recoup any part of the previous payments he may do so by showing the rescission was due to the fault of the vendee, and that he (the vendor) has suffered actual damages, and of what the damages consist. \* \* \* Under the circumstances the defendant (the vendor) would have the right, if he can, to show, first, that the failure to pay and the cause of the rescission were because of the fault of Hurley (vendee); and this being established, that he has been damaged in a certain way, and in a certain sum, which is subject to proof, if he can make it."

*Hurley v. Anicker*, 151 Pac. 593 (reported and annotated, L. R. A. 1918-B, 538).

Where vendee without justifiable excuse refuses to perform a contract to purchase real estate, he cannot recover from the vendor the amount he has paid on the purchase price if the latter is ready and willing to complete the contract.

*Steinbach v. Pettingill*, 67 N. J. L. 36.

## POINT II.

**The case does not exhibit an attempt to modify a contract under the Statute of Frauds by a subsequent oral agreement.**

It is to be noted that the appellee does not seek recovery on the ground that encroachments actually existed; his sole complaint is that the title company refused to issue a policy and he referred to the encroachments only as the reason assigned for the title Company's reluctance (Complaint, p. 6). The fact of actual encroachment and the justification of the title company's unwillingness were denied by the appellant's affidavits (p. 42, line 25).

The matter does not come within the purview of this court's holding that a written con-

tract as to encroachments may not be modified by parol.

*Kahoot v. Gurbisz*, 139 Atl. 223.

The criterion is whether there was a substituted subsequent *oral agreement* purporting to make *material changes* in the written agreement.

*Kersner v. Channan*, 98 N. J. L. 38.

Even when such material changes are agreed to, the modification will be upheld if the circumstances call for an estoppel against recanting.

*Gold v. Schneider, supra.*

On the same page (130 Atl. 133) will also be found *Schiff v. Alexander*, adopting the same principle and recognizing that when the conduct of the vendee causes a change of position of the opposite party he is estopped to deny the effect of a modification which he induced. The court was convinced that the vendor could not convey according to the written contract wherefore no change of position resulted.

In the present case the existence of encroachments and the inability of the vendor to convey a marketable title are denied.

The privilege of the appellant to forego the benefit of a provision beneficial only to himself and superadded to an otherwise complete agreement falls far short of being a parol modifying contract. It imported no terms by way of substitution and exacted of the vendor nothing different from what the original contract basically required, *i. e.*, a title, marketable in law, to premises free and clear of encumbrances.

*Weyl v. Schnell*, 96 N. J. L. 558.

If a subsequent oral arrangement does not itself constitute a contract within the statute, it is valid and will operate to modify the first contract.

20 Cyc. 287.

The provision as to a third party's approval of the title did not relate to any estate or interest in and concerning lands as did the remaining terms of the agreement. It was, therefore, wholly competent to omit it without the parties making a new agreement.

A contract not required to be in writing may be partially discharged or modified by parol.

*Strycker v. Vanderbilt*, 25 N. J. L. 482.

It is submitted that the appellants presented to the Court below facts sufficient to entitle them to defend and that the order striking out the answer and rule for judgment should be reversed.

RICHARD DOHERTY,  
Attorney for and of Counsel with Appellants.

121 OCT. 1. 1928

## New Jersey Court of Errors and Appeals

GEORGE GROSSMAN,  
*Plaintiff-Appellee,*

*v.*

LINCOLN TRUST COMPANY OF NEW  
JERSEY and HENRY J. BYRNE,  
Executors of Henry Byrne, de-  
ceased; ANNA BYRNE,  
*Defendants-Appellants.*

On Appeal from  
the Supreme  
Court.

### BRIEF OF PLAINTIFF-APPELLEE.

This is an appeal taken by the defendants from an order of Circuit Court Judge FRANK L. CLEARY sitting as Supreme Court Commissioner, striking out the answer and counterclaim of the defendants, and the subsequent entry of judgment final thereon in favor of the plaintiff and against the defendants. The order striking out the answer and the rule for judgment will be found on pages 47 and 49 of the State of the Case.

In order to properly comprehend the nature of the case an analysis of the pleadings and affidavits presented to the Trial Judge is necessary.

The complaint in this cause (Case, p. 4) is based upon a breach of a vendors' contract to convey real property in the City of Jersey City.

On the 5th day of May, 1927, Henry Byrne (since deceased) and Anna Byrne, his wife, as vendors, and the plaintiff George Grossman as vendee, entered into a contract for the sale and purchase of lands in Jersey City for the sum of \$25,500.00. A

covenant in said contract was as follows (Case, pp. 33, 35, fols. 25 to 30) :

“The party of the first part agrees to convey a marketable title, the test of marketability to be the furnishing of a title policy without exceptions by the New Jersey Title Guaranty & Trust Co.”

It is apparent from the affidavits submitted by the plaintiff, which include an affidavit by Mr. Howard R. Cruse, title officer of the New Jersey Title Guaranty & Trust Co. (Case, p. 30); affidavit by surveyor Clarence L. Dunham (Case, p. 28) and a copy of survey (Case, p. 36-a); and a copy of the Title Company's report dated August 19, 1927 (Case, p. 32), that the defendants were not on July 1, 1927, the date set for the closing, or at any time thereafter, able to convey a title such as the New Jersey Title Guaranty & Trust Company would insure with a title policy without exceptions. It is submitted that, in view of this clause in the contract, and in view of the proofs submitted to the Trial Judge, that the plaintiff was entitled to recover his deposit of \$500 paid under the contract and search and survey fees of \$300 together with interest thereon.

See:

*Love v. Fetters*, 98 N. J. Law 784; 121 Atl. 607.

*Love v. Fetters* is an opinion of this Court and it very clearly holds that a purchaser is entitled to stipulate for a title “not merely marketable in the usual sense of that word, but one that the Title Company would insure.”

We note that counsel for the appellants in his brief (p. 7) adverts to *Love v. Fetters*, but the comment by counsel for the appellants is glaringly

inaccurate as the case in no manner holds what counsel for the appellants maintains it holds. As we view it the case of *Love v. Fetters* is distinctly and decisively in favor of the plaintiff-appellee herein.

Having given this brief survey of the complaint and the proofs supporting it, it is now necessary to consider the answer and counterclaim filed by the defendants (Case, pp. 8 to 17).

In the first place the said answer admits the allegations contained in paragraphs 1, 2, 3 and 4 of the complaint and denies paragraphs 5, 6, 7 and 8 of the complaint.

The first separate defense in the complaint is to the effect that after the making of the contract referred to in said complaint, the same was by the mutual agreement of the plaintiff and the said Henry Byrne and Anna Byrne, so modified as to eliminate therefrom the provision that the test of marketability of title to be conveyed by the defendants was to be the furnishing of a title policy without exceptions by the New Jersey Title Guaranty & Trust Company.

The facts stated in the above separate defense, even if true, would not be a defense to this action.

See:

*Schiff v. Alexander*, 130 Atl. 133 (not yet officially reported);  
*Greenberg v. Weissberg*, 133 Atl. 70 (not yet officially reported).

The headnote in *Schiff v. Alexander, supra*, page 134, is to the effect that

“The terms of a written contract for sale of land may not be changed or varied by a subsequent oral agreement.”

and the case distinctly supports that cardinal proposition.

In *Greenberg v. Weissberg, supra*, the Supreme Court says:

“There are three grounds of appeal filed. The first two refer to the overruling two questions, both of which were designed to change or modify the terms of a written contract by parol in violation of the well established rule of evidence. *Johnson v. Buck*, 35 N. J. Law 338; 10 Am. Rep. 243. This was not error.”

At any rate the affidavit submitted by counsel for the defendants-appellants at the hearing on the motion to strike out the answer (Case, p. 39) clearly abandons this separate defense, because there is no intimation therein whatsoever that there was any agreement, parol or otherwise, to eliminate from the contract in question, the clause as to a title policy upon which we are relying.

The second separate defense is to the effect that the plaintiff entered in and upon the said lands and premises and from July 1, 1927, had possession of the same and took the rents, issues and profits to his own use (Case, p. 10). This defense is clearly sham, as the lengthy affidavit of the defendants (Case, p. 39) nowhere intimates either that the plaintiff took possession of the premises or that he took the rents, issues and profits thereof. There is not a scintilla of proof of the facts stated in this second separate defense.

The third separate defense is the main one relied upon by the affidavit of the defendants and in the brief of the appellants, and we shall consider this later in our brief.

The fourth separate defense (Case, p. 10) is to the effect that the defendants, the vendors, were at all times ready, able and willing to convey to the plaintiff, title to said lands and premises, which was and is marketable, in fact and at law. The allegations contained in this fourth separate de-

fense constitute no defense to the suit herein because the contract in question establishes the test of marketability, to wit, the furnishing of a title policy free and clear of exceptions by the New Jersey Title Guaranty & Trust Company. This fourth separate defense, therefore, falls to the ground.

*Love v. Fetters, supra.*

The fifth separate defense alleges that the plaintiff failed to execute and deliver to the defendant vendors, in pursuance of the covenants of his contract, "six separate mortgages in the principal sum of \$3,850 each, each mortgage to be a lien on one of the houses and lots in the said contract mentioned \* \* \* and refused to pay \* \* \* as part of the purchase price and in further fulfillment of the said contract, the sum of \$1,900."

There is no merit whatsoever to this fifth separate defense. It is elementary that in the situation as it existed, the plaintiff was not obliged to make any tender or to establish that he was ready, able and willing to take title. See the following cases:

*Hermann v. Ebert*, 98 N. J. Law 653; 121 Atl. 295;

*Dichter v. Isaacson*, 132 Atl. 481 (Affd. Court of Errors & Appeals, 138 Atl. 920), not officially reported;

*Bernstein v. Kohn*, 114 Atl. 543; 96 N. J. L. 223.

The above cases clearly dispose of the fifth separate defense to the complaint.

Let us now consider the third separate defense to the complaint. This defense is as follows (Case, p. 10):

"On July 1, 1927, and hitherto, the plaintiff well knowing that the said New Jersey Title

Guaranty and Trust Company was not willing to issue a title policy free and clear from exceptions, but was desirous of accepting mislocations and encroachments as shown by survey, waived the clause of the said contract providing that the test of marketability of title was to be the furnishing of such title policy."

It should be noted that no facts indicating a waiver are set forth in said third separate defense. However, the affidavits filed by the defendants-appellants relate that title was to close on July 1, 1927. That the title policy report was furnished on August 19, 1927, indicating that the defendants were unable to furnish a marketable title. That despite this, the plaintiff expressed no dissatisfaction with the contract and took no steps to rescind the contract until November, 1927, and that furthermore and about October 1, 1927, the plaintiff herein endeavored to sell said properties through the medium of an auction sale.

We have not taken the trouble to controvert, by affidavits, these facts because we appreciate and realize that on a motion to strike out the answer and counterclaim the facts set up in the answering affidavits of the defendants must be assumed for the purposes of the motion, to be true. However, we respectfully submit that the facts as set up in the affidavits of the defendants, even though true, could in no manner defeat the plaintiff's right of recovery.

*Schiff v. Alexander*, 130 Atl. 133;  
*Grossman v. Brick*, 139 Atl. 490;  
*Walls v. Chrstos*, 139 Atl. 3;  
*Lloyd v. Weinstock*, 135 Atl. 65;  
*Dichter v. Isaacson*, 132 Atl. 481 (Aff'd. by  
 this Court 138 Atl. 920).

The above cases are not officially reported.

The cardinal point to be kept in mind is that the plaintiff is relying upon a written clause in a written contract, a contract governed by the Statute of Frauds. That clause, the proofs indicate, is clearly breached. There can be no estoppel herein as the defendants have been in no manner prejudiced.

The plaintiff relies upon the case of *Gold v. Schneider*, 130 Atl. 133 (not officially reported). The case of *Gold v. Schneider* involved an estoppel and is clearly distinguishable, as will be noted by the remarks of Judge ACKERSON, whose opinion was adopted and affirmed by the Supreme Court in the leading case of *Schiff v. Alexander*, 130 Atl. 133:

“The defendants claim in this defense that they are not seeking to abrogate a written contract by parol, but are only pleading facts, which, if true, would raise an estoppel as against the plaintiffs because it is claimed that the plaintiffs caused the defendants to agree to sell and convey only two of the houses upon an understanding that the plaintiffs would take title to the two houses, subject to all mislocations and encroachments, upon defendants’ agreement to relieve the plaintiffs of their obligation to take all four houses, and the defendants cite the case of *Gold v. Schneider* (N. J. Sup.), 130 A. 133, as an authority for this proposition. As already observed, the facts set forth in this separate defense are not supported by affidavit, but, aside from this, the case of *Gold v. Schneider*, *supra*, has no application to the first defense set up in the case *sub judice* because, in the case of *Gold v. Schneider*, the plaintiff requested the defendant to change certain bank mortgages, which were to be upon the property when conveyed, to mortgages held by individuals, who in compliance therewith made the change. This was a clear case of a change of position caused by

the conduct of the opposite party, which is the real test of an estoppel, and for the further reason that the defendant in the last mentioned case was able to perform the contract as originally written, to purchase the property covered by bank mortgages. In the case *sub judice*, the defendants were unable to perform the original contract either on the day fixed in the contract for performance, or at any other time. Therefore, assuming that the plaintiffs did agree to take two houses instead of four, the defendants did not change their position, because they were unable to convey the four houses according to their agreement, and the mere fact that plaintiffs were willing to take two houses instead of four did not produce a change of position on the part of the defendants to their detriment, which is an essential element of estoppel, and furthermore there was no consideration whatever for the plaintiffs in accepting two houses instead of four, because the statement of the defendants that they agreed to release the plaintiffs from their obligation to take the four houses could not be a consideration for the reason that there was no obligation on the part of the plaintiffs to take these four houses because of the defects already mentioned, hence there was no obligation to release the plaintiffs from.

"It seems entirely clear that the defendants, by their first separate defense, are seeking to change and vary the terms of a written agreement by an oral one, which is not permissible under the authority of *Bowers v. Glucksman*, 68 N. J. Law 146, 52 A. 218; *Lippincott v. Bridgewater*, 55 N. J. Eq. 208, 36 A. 672; *Kerzner v. Chanin*, 98 N. J. Law 38, 118 A. 693.

"For this reason, therefore, the first separate defense should be struck out as both sham and frivolous."

Furthermore, the cases cited by the counsel for the defendants-appellants in no manner support his contention.

The case of *Faulkner v. Wasserman*, 77 N. J. Eq. 537, 30 L. R. A. (N. S.) 872, is clearly not in point, as there was no clause of a contract involved. That case involved a rescission because of fraudulent misrepresentations and of course a rescission in equity because of fraud can easily be barred by laches, waiver or failure to act promptly. The case in no manner whatsoever supports the proposition for which it is cited by counsel for the defendants-appellants in his brief.

Similarly the attention of this Court should be called to the fact that the case of *Randolph v. General Investors Co.*, 2 N. J. Advance Rep. 1158; 124 Atl. 765, upon which great reliance is placed by counsel for defendants-appellants, was unanimously reversed by this Court in the case of *Randolph v. General Investors Co.*, 97 N. J. Eq. 493; 128 Atl. 156.

Counsel for the defendants-appellants is clearly in error in his argument about waiver. The cases cited by him in no manner support his proposition. His erroneous view is strikingly brought out by another line of cases.

Let us assume that the plaintiff herein, to put it most strongly against him, had actually accepted a deed for the premises with the usual covenant against encumbrances from the defendants herein, with *full knowledge* of the defects in title. Even in such a situation it has been held in this state, that mere knowledge on the part of a purchaser that there is an encumbrance will not militate against his suit on a covenant against encumbrances.

*De Mars v. Koehler*, 41 Atl. 720; 62 Law 203;

*De Long v. Spring Lake Beach Improvement Co.*, 59 Atl. 1034; 72 L. 135;

*Propper v. Coulson*, 99 Atl. 385; 86 Eq. 399;

*Simpson v. Klipstein*, 105 Atl. 218; 89 Eq. 543.

In *De Mars v. Koehler, supra*, the headnote is to the effect that:

“An unrestricted covenant against encumbrances, contained in a deed for the conveyance of lands is broken by the existence of an outstanding term in the lands, and an action for such a breach of the covenant may be maintained notwithstanding the existence of the outstanding term was known to the grantee when he accepted the conveyance.”

It would seem therefore that knowledge on the part of the purchaser of the defect, and his conduct thereon even to the extent of accepting a deed, is not in any manner a waiver of a specific clause of the contract.

It is submitted, therefore, that the matters set up in the answer as supported by the defendants' affidavits, constituted no defense to this action and that the Supreme Court Commissioner, in striking out the answer, was clearly right. It would seem that even at a trial, the Court, if such facts were adduced as are here adduced, would be compelled to direct a verdict for the plaintiff.

Furthermore, if the answer is sham and of no validity as a defense, the counterclaim must likewise fail.

*Schiff v. Alexander*, 130 Atl. 133, *supra*  
(not officially reported).

Another point should perhaps be disposed of. We note in the counterclaim that Herman Bardack is made a defendant. This is clearly improper under the Statute of Frauds.

See:

*Randolph v. General Investors Co.*, 97 N. J. Eq. 493; 128 Atl. 156.

The case of *Randolph v. General Investors Co.* clearly holds that under the Statute of Frauds

parol evidence cannot be introduced to show that an alleged agent stated in the contract to be a party thereto, and who signed as principal, in fact signed as agent for another. To charge a party upon a contract for the sale of real estate said party's name must appear in the contract and he must have signed said contract. The counterclaim clearly should have been stricken out.

We might also state that there is no merit in the point made by counsel for the defendants-appellants that the original objection made by the plaintiff was the fact of the encroachment and that the final ground alleged in the complaint is the failure to give a marketable title according to the standard set by the New Jersey Title Guaranty and Trust Co. It is obvious that the two grounds are identical.

It is submitted that the Supreme Court Commissioner was clearly right in striking out the answer and counterclaim and that the entry of judgment for the return of deposit and the search fees, was not error (summary judgment may be entered for search fees, see *Grossman v. Brick*, 139 Atl. 490, not officially reported).

**It is respectfully submitted that the judgment of the Court below should be affirmed.**

Respectfully submitted,

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